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In the Supreme Court

OF THE

United States

October Term, 1955

No. 294

Arthur H. Samish,
Petitioner,

vs.

United States of America,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
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OCTOBER TERM, 1955

No.

ARTHUR H. SAMISH,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Arthur H. Samish, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed a conviction of the petitioner on eight counts of an indictment charging him with wilfully attempting to defeat and evade the payment of income taxes. (26 USC 145(b).)

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported but is included in the transcript of record at pages 2116 to 2128. A copy of the opinion is appended.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on May 20, 1955. (R. 2129.) A copy of the judgment is appended. A petition for rehearing was filed on June 17, 1955, and denied on July 8, 1955. An application for Stay of Mandate was filed July 8, 1955, and the Mandate was by said Court of Appeals on that day ordered stayed until disposition of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Under the circumstances of this case, one of the main issues in dispute was the conflict between the Biow Company, a nationally known advertising agency, and Samish, a nationally known political figure, in respect to whether certain admitted payments received by him were received in connection with his political activities or were paid as a commission for services performed in connection with getting an advertising account for the Biow Company. In this setting these questions, highly important in the administration of criminal justice and of equal

importance in the administration of the revenue laws of the United States, arise.

1. Payments from the Biow Company constituted the claimed understatement of income here. In view of the fact that these payments were shown to be falsely entered as improper deductions by the Biow Company and in view of the admonitions of this Court, of Courts of Appeals of other circuits and of the Internal Revenue Code that taxpayers must keep and render true accounts, did the trial court properly state the law by instructing the jury:

> "• • • If an item of expense, such as commissions, is included in the total deductible expenses on any taxpayer's books, it is immaterial under which particular deductible expense account it might appear. • • •"

Or, stated another way—where a dispute exists between the government's witnesses and the defendant as to the purposes of payments made to the defendant, all of which payments are the basis of the charge against him, and where the defendant has developed clearly that the government's witnesses had made false and fraudulent entries in its books in respect to the purposes of the payments and the recipients thereof, is it error to instruct the jury that the false entries are immaterial?

2. Whether the trial court may under the guise of an instruction on law comment to the jury on the evidence in a manner prejudicial to the defendant. This occurred when the trial court erred in instructing the jury that it could look to false book entries showing disbursements for fictitious expenses in determining whether the Biow

Company intended to make gifts of those disbursements to petitioner.

3. Whether prejudice to the defendant is removed by the mere striking of evidence from the record and directing the jury to disregard it where the matters stricken are inflammatory and prejudicial, the evidence received and then stricken being, briefly, 44 pages of testimony from professional gamblers and employees of professional gamblers which involved the defendant and which was used in an effort to sustain an opening statement assigned as misconduct at the time it was made that petitioner gambled in one year over one and a half million dollars and received $25,000 unreported taxable income, none of which was covered in the indictment.

4. Whether prejudicial error occurred when the trial court admitted in evidence a large chart purporting to collect and present in continuous fashion certain facts in evidence concerning the charge against petitioner, prepared by a revenue agent who sat as part of the prosecuting team throughout the trial and who was, over objection, permitted to point out and present to the jury by argument and statements the evidence the government had introduced by other witnesses and exhibits to prove the charge against petitioner, all in direct conflict with decisions of the Court of Appeals for the Fifth Circuit.

5. Whether prejudicial error occurred when the trial court refused to permit the introduction in evidence of the extra-judicial confession by the government's key witness, Biow, to impeach him and to prove that the disbursements involved were taxable to him and not to petitioner.

6. Whether the trial court erred to the substantial prejudice of petitioner by allowing the government to introduce in great length neither relevant nor material evidence in rebuttal consisting of opinion evidence that the endorsements on three checks issued by the Biow Company were the handwriting of others who were merely known to petitioner.

7. Whether the prosecutor was guilty of assigned prejudicial misconduct in arguing to the jury that petitioner had the duty of calling his secretary to corroborate his own uncontradicted testimony that she was the recipient of three checks as gifts from the Biow Company.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are:

Internal Revenue Code; Sections 41, 145(a) and 145(b) (26 U.S.C. Sections 41, 145(a) and 145(b));

U. S. Treas. Reg. 118 Section 39.54-1 (1953).

They are included in the appendix.

STATEMENT OF THE CASE.

Petitioner was indicted on May 5, 1953, in the United States District Court, Northern District of California, Southern Division. The indictment charged him in eight counts with wilfully attempting to defeat and evade payment of income taxes. (26 USC 145(b) (R. 3-10).) He was convicted and sentenced to three years imprisonment and

to pay a fine of $40,000.00. (R. 131-3.) The court of first instance had jurisdiction. (18 USC 3231, Rule 18, Federal Rules of Criminal Procedure.) Upon conviction, the judgment was affirmed by the Court of Appeals for the Ninth Circuit. (R. 2129.)

The amount of unstated income charged in the indictment is the amount of money claimed by the government to have been received by petitioner as taxable income in the form of 39 checks from the Biow Company to payees other than petitioner.

The government contended and introduced evidence to show that petitioner received checks from the Biow Company in exactly the amounts charged in the indictment. Petitioner admitted the receipt of all of the checks involved except three, one of which he denied receiving, and two of which he did not remember receiving. (R. 1390-1419.) The issue was presented to the jury as to whether the payments to petitioner were compensation and, hence, taxable as income to him, or were funds made available to petitioner for the purpose of making gifts of the Biow Company or political contributions on behalf of the Biow Company. It goes without saying that if the payments were for either or both of the latter, the amounts were not deductible items of the Biow Company for tax purposes and would not be taxable as income to the petitioner.

The government relied almost completely upon the testimony of Milton H. Biow and Morris Zinneman, president and treasurer, respectively of the Biow Company, a nationally known advertising firm. (R. 377, 379, 581.) These witnesses declared the amounts disbursed to peti-

tioner were compensation for services rendered. (R. 387-8, 512.) They claimed there was an agreement between them and petitioner that petitioner would be paid a brokerage or commission in consideration for petitioner's having secured Schenley Distilleries as an advertising account for the Biow Company. The brokerage or commission, it was asserted, would be one-quarter of three per cent of the billings from the Biow Company to Schenley Distilleries. Biow and Zinneman claimed each of the 39 checks in question, aggregating some $90,000.00, was given to petitioner pursuant to this agreement. (R. 447, 512, 517.)

Petitioner is in the public relations business. (R. 1467.) He has long been interested in political affairs, having served for many years as a legislative representative of large industries in California and elsewhere. (R. 1370.) Among other tasks, he has served as a conduit through which political contributions running into substantial sums each year have been made. (R. 1425-6.) These political contributions passing through his hands throughout the years were never included in his income tax returns, with the apparent approval of the Bureau of Internal Revenue. (R. 1438.)

Appellant denied that he had any arrangement to receive a commission from the Biow Company and, on the contrary, claimed that his services were insubstantial and that the moneys, which amounted to about $15,000 a year, represented moneys made available to him by the Biow Company for political contributions and gifts to the payees of certain checks. (R. 1383-88, 1459.) No check was issued in the name of petitioner. (R. 524.) Petitioner

testified that Zinneman asked petitioner for names to be used on checks, and petitioner suggested his own. He claimed that Zinneman stated that he did not want petitioner's name on the checks in any fashion and, when asked why, stated that was his own business. (R. 1389.)

Upon cross-examination of Biow and Zinneman, petitioner established: His name did not appear on the books of account of the Biow Company under a commission or a brokerage account or at all (R. 708); the Biow Company had hidden the disbursements by entries in its books of account charging the checks to such accounts as "radio," "radio time," "newspapers," "outdoors," "magazines" and "accruals"; the Biow Company had never made out, filed or returned to the Treasury Department any Form 1099 or 1096 indicating payments to petitioner as compensation (R. 781); the total amount of money represented by the checks bore no relation to the claimed one-quarter of three per cent formula testified to by Biow and Zinneman, because that formula would have brought to petitioner over $100,000.00 above the amount represented by the 39 checks; and he, petitioner, met Biow under completely different circumstances than those testified to by Biow on direct examination. (R. 429-432.)

A clear issue appears in the case under the evidence whether (a) petitioner intended to evade the payment of income taxes on commissions paid to him; or, (b) the Biow Company attempted to evade income taxes by claiming as deductible expense items, payments which under the law were not deductible.

Petitioner attempted, but was not allowed, to establish one further crucial fact. Biow and Zinneman, prior to the indictment of petitioner, had made sworn statements to agents of the Bureau of Internal Revenue wherein they testified similarly to their testimony at the trial. This testimony constituted the whole of the government's case against petitioner. Upon cross-examination, Biow was asked if it was not true that shortly after making the statements to the Bureau of Internal Revenue, he had stated to Alfred B. Lyon, Chairman of the Board of the Philip Morris Company, that he had done wrong and that it was entirely his fault. Biow answered no. Biow was asked if he had not suggested to Lyon that he, Biow, put petitioner on Biow's payroll for a period of five years to undo the wrong he had done petitioner, and Biow answered no. Biow gave his full version of the conversation. (R. 408-12.)

Lyon was called as a witness by petitioner. The conversation between Lyon and Biow which was the subject of Biow's cross-examination was identified, and Lyon was asked to give his recollection of that conversation. The government's objection that no proper foundation had been laid was sustained. The testimony sought to be elicited was kept from the jury. (R. 1316-17.)

Added facts appear where necessary to amplify reasons for allowance of the writ.

REASONS FOR ALLOWANCE OF THE WRIT.

1. **WHERE A DISPUTE EXISTS BETWEEN THE GOVERNMENT'S WITNESSES AND THE DEFENDANT AS TO THE PURPOSES OF PAYMENTS MADE TO THE DEFENDANT, ALL OF WHICH PAYMENTS ARE THE BASIS OF THE CHARGE AGAINST HIM, AND WHERE THE DEFENDANT HAS DEVELOPED CLEARLY THAT THE GOVERNMENT'S WITNESSES HAD MADE FALSE AND FRAUDULENT ENTRIES IN ITS BOOKS IN RESPECT TO THE PURPOSES OF THE PAYMENTS AND THE RECIPIENTS THEREOF, IT IS ERROR TO INSTRUCT THE JURY THAT THE FALSE ENTRIES ARE IMMATERIAL.**

The trial court erroneously instructed the jury as follows:

> "The law does not require that any taxpayer segregate his deductible expenses in any way, nor that any deductible expenses be carried on the taxpayer's books under any particular account name. *If an item of expense, such as commissions, is included in the total deductible expenses on any taxpayer's books, it is immaterial under which particular deductible expense account it might appear.* All ordinary and necessary expenses incurred in carrying on a business, including compensation for personal services rendered, are allowed as a deduction."
>
> (R. 1988, 2017) (Emphasis added.)

The Court of Appeals held that giving this instruction was not error but stated that it would have been better if it had not been given. (R. 2126.)

This instruction nullified petitioner's defense. In holding that this instruction was properly given, the Court of Appeals has sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In holding that this instruction was properly given, the Court of Appeals has decided a federal question in such a manner as to conflict with applicable decisions of this Court and of Courts of Appeals of other circuits, and with the Internal Revenue Code and Regulations.

Every check produced in court was falsely reflected in the books of the Biow Company. Each entry in the books was made at the direction of Zinneman, a chief government witness. Each entry, therefore, was in fact a prior expression by Zinneman as to the disposition of the moneys represented by the very checks in question here.

Under any theory of the case the false entries in the Biow books of account were imposing evidence of the guilt of Biow and Zinneman of a crime against the revenue laws. Under the defense of petitioner that the checks were given him as gifts and political contributions, the dishonest entries represented a scheme by government witnesses to defraud the government by burying improper business deductions. (*Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364 (1943).) Under the theory of the government, indeed by the testimony of Biow and Zinneman themselves to the effect that the disbursements to petitioner were for compensation, the Biow Company was admittedly in violation of the revenue laws Section 145 (a) Title 26 U.S.C.A. in its failure to file Form 1096 reporting the purported payments to petitioner. (*United States v. Carroll*, 345 U.S. 457, 73 S.Ct. 757 (1953).)

The Biow Company books supported a major part of petitioner's defense. They were consistent with the petitioner's contention that he received practically all of the checks as contributions for political purposes and as gifts

by the Biow Company. If this were true, the money represented by the checks was not taxable to petitioner and was not a proper deduction for the Biow Company to claim taxwise. In the circumstances of this case the dishonest bookkeeping was the fact from which two inconsistent inferences of ultimate fact could be drawn: one, that the false entries were intended to conceal the true nature of the disbursement so as to evade part of Biow's tax liability; the other that it was an effort by the Biow Company to help petitioner evade part of his tax liability. The latter inference was never urged by the government nor offered as an explanation by Biow or Zinneman. The former was the natural inference to flow from the described conduct. It was an inference approved by this Court in *Spies v. United States,* supra, where it stated at page 499 "• • • we • • • think affirmative, wilful attempt (to evade and defeat taxes) may be inferred from conduct such as • • • making false entries or alterations, • • • and any conduct the likely effect of which would be to mislead or conceal."

Fairly appraised, the false entries in the books of the Biow Company stood out as the most *material fact* in favor of the defendant and constituted a monumental discreditation of the memory, motive, interest and integrity of Biow and Zinneman, thus discrediting the entire case of the government. This was petitioner's defense—that the government's case was false and untrue. This is what petitioner was entitled to have the jury consider when it retired to determine whether the government's case, i.e., the testimony of Biow and Zinneman, proved petitioner guilty beyond a reasonable doubt. Yet this, the petitioner's defense, was nullified and erased from the

case when the court told the jury *"If an item of expense, such as commissions, is included in the total deductible expenses on any taxpayer's books, it is immaterial under which particular expense account it might appear."*

The instruction told the jury that the law does not require taxpayers to keep correct and honest books.

That, of course, is not the law

> "The United States has relied for the collection of income tax largely upon the taxpayer's own disclosures * * * *this system can function successfully only if those within and near taxable income keep and render true accounts."* (Emphasis added.)
>
> *Spies v. United States,* supra, p. 495;
>
> *United States v. Yoeman-Henderson Inc.,* 193 F. 2d 867, 870 (7 Cir. 1952);
>
> *Bell v. United States,* 185 F.2d 302, 308 (4 Cir. 1950);
>
> *United States v. Hornstein,* 176 F.2d 217, 220 (7 Cir. 1949);
>
> *Welp v. United States,* 103 F. Supp. 551, 561 (M.D. Iowa 1952) Reversed on other grounds, 201 F.2d 128 (8 Cir. 1953);
>
> 26 U.S.C. §41;
>
> 26 U.S.C. §145 (a);
>
> Regulation 118, §39.54-1.

The giving of this instruction was not casual error occurring in the course of the trial. The severity of its prejudice to the petitioner was accentuated by the fact that the trial court, in discussing instructions with counsel before giving them, indicated that this instruction would not be given. (R. 1804.) However, an Assistant

Attorney General was sent to San Francisco to aid in the prosecution of petitioner and in his argument to the jury he stated as follows:

> "Now from that income the Internal Revenue Code also provides that ordinary and necessary expenses of business may be deducted. You, Ladies and Gentlemen, of course, all know that some salaries paid by an employer to his employee are deductible expenses.
>
> "There has been brought into this case by the defendant a matter which is not material to the guilt or innocence of this defendant. A question has been raised as to the manner in which the Biow Company kept their books. I would not presume to stand before you, Ladies and Gentlemen, and argue that the Biow Company recorded these transactions according to the best accounting methods. But if the government's position is true—and I submit that the evidence proves that beyond a reasonable doubt—then the Biow Company was entitled to claim these payments as a business expense and properly deducted them as such in determining their net taxable income, and the manner in which they charge it is immaterial if it was a business expense.
>
> "And there is no requirement under the law about how books should be kept; the only requirement is that those books correctly reflect the income. And I submit that the books of the Biow Company with respect to the payment of these brokerage fees properly reflect them being charged as an expense and deducted as a business expense in arriving at their net taxable income." (R. 1834-5.)

The Biow Company books took the same front row position in petitioner's argument to the jury that they

took in the rest of the trial. With some vigor, counsel argued to the extent of telling the jury that the Assistant Attorney General should be ashamed of himself in advancing such an argument. Counsel for petitioner directed the attention of the jury to the anomolous situation in which an Assistant Attorney General of the United States was found supporting as proper or immaterial the fraudulent entries of the Biow Company in its books of account. (R. 1865-6, 1892.) Petitioner's counsel argued that the dishonest books reflected on the credibility of the witnesses Biow and Zinneman. That they were dishonest and the way in which they were dishonest reflected on the whole of the government's case by showing that in fact the moneys passing from Biow to petitioner were not deductible to Biow, but taxable to it. (R. 1886-97, 1904, 1926-9.)

Thus, the materiality of the false entries in the books loomed large in the case in the manner in which the case was tried and presented to the jury.

When, immediately upon the conclusion of the argument, the trial court instructed the jury, it not only misstated principles of law, but violated the very object of the requirements of Rule 30, Federal Rules of Criminal Procedure, and, in effect, put a stamp of approval on the argument of the Assistant Attorney General. (*Ross v. United States,* 180 F.2d 160, 165 (6 Cir. 1950.)

This was an instruction given in a tax case. If this instruction is permitted to stand, every defendant in a criminal tax evasion case would be entitled to this instruction as a correct statement of the law.

2. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD LOOK TO FALSE BOOK ENTRIES SHOWING DISBURSEMENTS FOR FICTITIOUS EXPENSES IN DETERMINING WHETHER THE BIOW COMPANY INTENDED TO MAKE GIFTS OF THOSE DISBURSEMENTS TO PETITIONER.

Petitioner's right to a fair trial was destroyed by comment of the trial court in its instructions which unfairly summarized the evidence in such a manner as to destroy petitioner's defense. The trial court instructed the jury:

> "If you find it to be a fact that the Biow Company charged to business expenses any payment that you may find to have been made to the defendant, you may consider that fact among other facts in determining whether or not the Biow Company intended such payments to be gifts." (R. 1989, 2018.)

The only possible relevance of this instruction is that it refers to petitioner's defense that much of the money represented by the checks were gifts from the Biow Company to certain named payees. Whether these particular checks were gifts by the Biow Company or represented compensation to petitioner was one of the issues for the jury to determine. In determining whether or not the disbursements from the Biow Company were gifts, it was certainly proper for the jury to look to the intent of the Biow Company in making the disbursements. The trial judge quite properly had told the jury this when he stated:

> "The principal consideration in determining whether or not a payment is a gift within the meaning of the Internal Revenue laws depends on whether there was an intention to make a gift." (R. 1989, 2018.)

It was after giving the last instruction quoted that the trial court told the jury that in determining the intent of the Biow Company, it could look to the Biow Company books of account and, in looking at these books of account, if the jury found the Biow Company charged to certain business expenses any payments that the Biow Company made to the defendant, the jury could consider that fact in determining whether the Biow Company intended the payments to petitioner to be gifts. It was an undisputed fact in the case that the Biow Company fraudulently charged to certain business expenses the disbursements which it made to petitioner. This was the only fact set out by the court for the jury to use as a guide in determining the intent of the Biow Company with regard to the checks claimed by petitioner to be gifts. The one-sidedness of the charge is itself a serious breach of the court's function.

Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698 (1933);

Byford v. United States, 185 F.2d 171, 174 (10 Cir. 1950);

Billeci v. United States, 184 F.2d 394, 402-3 (C. A. D. C. 1950);

Williams v. United States, 93 F.2d 685, 692 (9 Cir. 1937).

But far more important is the fact that this one guide which the court gave the jury is based upon a premise which is totally false. This is so because every entry in the Biow books which the court told the jury they could use in determining whether the Biow Company intended the payments to petitioner to be gifts *was admittedly false.*

The false entries charging the checks in question to certain fictitious business expenses could not possibly support the inference invited by the court—namely, that because the checks were charged to certain business expenses (falsely) the Biow Company did not intend such payments to be gifts. False entries indicate nothing but a false purpose. False entries in the language of this court in *Spies v. United States,* supra, indicate an intent to defeat and evade taxes. The more rational inference was that the fictitious entries indicated a purpose of disguising gifts (non-deductible) as expenses (deductible).

The instruction is contrary to the law as declared by the *Spies* case, supra. The giving of the instruction also conflicts with the decision of this Court in *Quercia v. United States,* supra, and with the decisions of Courts of Appeals of other circuits. (*Billeci v. United States,* supra; *Byford v. United States,* supra; *Williams v. United States,* supra.)

3. PREJUDICE TO THE DEFENDANT IS NOT REMOVED BY THE MERE STRIKING OF EVIDENCE FROM THE RECORD AND DIRECTING THE JURY TO DISREGARD IT WHERE THE MATTERS STRICKEN ARE INFLAMMATORY AND PREJUDICIAL, THE EVIDENCE RECEIVED AND THEN STRICKEN BEING, BRIEFLY, 44 PAGES OF TESTIMONY FROM PROFESSIONAL GAMBLERS AND EMPLOYEES OF PROFESSIONAL GAMBLERS WHICH INVOLVED THE DEFENDANT AND WHICH WAS USED IN AN EFFORT TO SUSTAIN AN OPENING STATEMENT ASSIGNED AS MISCONDUCT AT THE TIME IT WAS MADE THAT PETITIONER GAMBLED IN ONE YEAR OVER ONE AND A HALF MILLION DOLLARS AND RECEIVED $25,000 UNREPORTED TAXABLE INCOME, NONE OF WHICH WAS COVERED IN THE INDICTMENT.

The sole basis upon which petitioner was indicted was that he received taxable income from the Biow Company which he did not report. The charged understatement of income in each count of the indictment was the exact amount represented by the Biow Company checks for the particular year involved. Petitioner was indicted on the Biow transaction and the petitioner went to trial on the Biow transaction. Notwithstanding this, the prosecutor was unrelenting in his efforts to picture petitioner before the jury as a gambler upon a very large scale. Thus, in opening his case, the prosecutor stated:

> "The Government will show that there was in operation during the year 1949 in the City of San Francisco a gambling establishment known as Film Row Club. It was a large so-called lay-off operation through which bets on various sporting events were handled and through which various large sums of money were paid and received by the management in connection with bets made with private individuals and local bookmakers.
>
> The Government will show that during the year 1949 gross bets in excess of a million and a half dollars were placed by the defendant in his account with

the Film Row Club and that as a result of bets placed in that Film Row Club, total wins in excess of $25,000.00 were received by the defendant, Arthur Samish, and that no report was ever made of the winnings received by him of bets placed in the Film Row Club.

As in the case of the Biow Company income, Revenue Agents and technical experts will show that the books and records of Mr. Samish do not reflect any information regarding the contact with the Film Row Club and the betting operations between Mr. Samish and the Club." (R. 317-8.)

Subsequently, and in the last stages of its case in chief, the government produced four professional gamblers in an effort to support the opening statement. Their testimony spans 44 pages of the printed record and delves with particularity into the underworld of large scale gambling activities in the City of San Francisco where petitioner was standing trial. Thus, the Film Row Club was identified as a betting establishment and its records produced and identified. Betting codes were deciphered and gambling terms explained. Petitioner was identified by one witness as a mysterious FX whose initials appeared throughout the records as a large scale bettor. (R. 997.) The court ordered the testimony concerning the alleged gambling stricken from the record for lack of foundation. (R. 1022.) The stated purpose of the United States Attorney in offering the evidence concerning a million and a half dollars worth of gambling, was to prove a net profit from gambling by petitioner in 1949. (R. 967-8.) Yet, the United States Attorney certainly knew, or should have known, that the evidence would not be admissible against petitioner. "The witness was the prosecution's

witness. Under such circumstances, the law is clear that the prosecutor is chargeable, as a matter of law, with knowledge of the responsive answers to questions asked by him." (Peters, J., in *People v. Collins,* 50 Cal. App. 2d 281, 288, 123 P.2d 43 (1942).)

The opinion of the Court of Appeals declared, without citation of authority, that it was the duty of the United States Attorney "to try his level best to get the records in evidence." (R. 2123.)

This declaration is in direct conflict with the sound principles which should guide United States Attorneys in the administration of justice.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935);

Ross v. United States, 180 F.2d 160, 168 (6 Cir. 1950);

United States v. Levi, 177 F.2d 827, 830 (7 Cir. 1949);

Baker v. United States, 115 F.2d 533, 543 (8 Cir. 1940);

Pierce v. United States, 86 F.2d 949, 952-3 (6 Cir. 1936);

Minker v. United States, 85 F.2d 425, 426 (3 Cir. 1936).

An obvious purpose of the United States Attorney was to dwell before the jury as long as possible upon gambling. Whether or not this was the sole purpose, the result was the same in its prejudice to petitioner.

The task of dealing with irrevocable prejudice of the type here involved is not new. Where it occurs the rem-

edy is always reversal. This Court recognized the problem many years ago when in *Hopt v. People,* 120 U.S. 430, 7 S.Ct. 614 (1887), at page 438, Justice Field noted:

> "It is true in some instances there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; * * *."

This principle was thereafter responsible for the reversal by this Court in *Waldron v. Waldron,* 156 U.S. 361, 15 S.Ct. 383, 389 (1895), and was a reason for reversal in *Throckmorton v. Holt,* 180 U.S. 552, 567, 21 S.Ct. 474 (1901). The problem is a continuing one and quite recently brought from Justice Jackson the realistic pronouncement in his concurring opinion:

> "The naive assumption that prejudicial effects can be overcome by instructions to a jury * * * all practicing lawyers know to be unmitigated fiction."
>
> *Krulewitch v. United States,* 336 U.S. 440, 453, 69 S.Ct. 716 (1949).

So much harm was done that it is not reasonable to conclude that it was eradicated by the cautionary instructions given by the court, "for that seems to be asking of the laymen composing the jury something which was well nigh impossible."

Hartman v. United States, 215 F. 2d 386 (8 Cir. 1954);

United States v. Sansone, 206 F. 2d 86 (2 Cir. 1953);

Mora v. United States, 190 F. 2d 749, 752 (5 Cir. 1951).

4. PREJUDICIAL ERROR OCCURRED WHEN THE TRIAL COURT ADMITTED IN EVIDENCE A LARGE CHART PURPORTING TO COLLECT AND PRESENT IN CONTINUOUS FASHION CERTAIN FACTS IN EVIDENCE CONCERNING THE CHARGE AGAINST PETITIONER, PREPARED BY A REVENUE AGENT WHO SAT AS PART OF THE PROSECUTING TEAM THROUGHOUT THE TRIAL AND WHO WAS, OVER OBJECTION, PERMITTED TO POINT OUT AND PRESENT TO THE JURY BY ARGUMENT AND STATEMENTS THE EVIDENCE THE GOVERNMENT HAD INTRODUCED BY OTHER WITNESSES AND EXHIBITS TO PROVE THE CHARGE AGAINST PETITIONER, ALL IN DIRECT CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Revenue Agent Kisthardt was retained in the courtroom by the government throughout the trial to assist government counsel in the presentation of its case. (R. 300.) Kisthardt was called as a witness by the prosecutor toward the close of the government's case in chief. After giving testimony concerning his investigation of petitioner's tax affairs and other related matters, Kisthardt testified that he had prepared a summary. He said it was based upon the travel record of petitioner, the Biow Company checks, the dates of the checks and the dates upon which they were cashed, and upon a stipulation, all in evidence. (R. 1039.) The stipulation purported to show registration of the petitioner at various hotels throughout the United States on particular dates. (R. 1023-5.) The summary which Kisthardt prepared (Exhibit 62) is in the form of a chart which purports to describe each Biow Company check, the check number, the date the check was drawn, the whereabouts of petitioner upon that date, the support in the trial record for the statement regarding the whereabouts of petitioner, the payee of the check, the amount of the check, the bank

upon which the check was drawn, the date that the check was cashed, the whereabouts of petitioner upon the date the check was cashed and, again, the support in the trial record for the statement concerning petitioner's whereabouts upon the date the check was cashed, and the endorsements on the checks. The chart was admitted in evidence over objection. There followed a 23-page reiteration of the data on the chart. (R. 1042-65.) Exhibit 62 is appended.

Thus, the government was permitted to introduce the original evidence, a written argument of the evidence arranged in the form of a chart emphasizing government contentions, and an oral argument of the same matters permitted under the guise of a recitation of the contents of the chart.

The court below held the receipt of the summary entirely proper. (R. 2123.)

This Court has had recent occasion to point out:

> "• • • bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."
>
> *Holland v. United States*, 75 S.Ct. 127, 131 (1954).

Exhibit 62 and the testimony of Kisthardt reiterating its contents represent a radical departure from the accepted and usual course of judicial proceedings attendant upon the trial of a criminal cause. It is entirely dissimilar from those instances in which Government experts are allowed to present calculations and opinions from books and returns in evidence where it has been held that

a jury without such guidance would be unable to cope with complicated accounts.

Cf.:

United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233 (1943);

Beaty v. United States, 213 F. 2d 712 (4 Cir. 1954);

United States v. Schenck, 126 F. 2d 702 (2 Cir. 1942);

United States v. Kelley, 105 F. 2d 912 (2 Cir. 1939).

The decision of the court below is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit. *Elder v. United States,* 213 F. 2d 876 (5 Cir. 1954); *Steele v. United States,* 5 CCH 1955 Fed. Tax Rep. ¶ 9438 (5 Cir. 1955).

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5. PREJUDICIAL ERROR OCCURRED WHEN THE TRIAL COURT REFUSED TO PERMIT THE INTRODUCTION IN EVIDENCE OF THE EXTRAJUDICIAL CONFESSION BY THE GOVERNMENT'S KEY WITNESS, BIOW, TO IMPEACH HIM AND TO PROVE THAT THE DISBURSEMENTS INVOLVED WERE TAXABLE TO HIM AND NOT TO PETITIONER.

The whole of the government's case rested upon the trustworthiness and testimony of Biow and Zinneman. These were the witnesses who testified that checks given to petitioner represented compensation to him. (R. 387-8, 513.) These were the witnesses who testified to the one-quarter of three per cent formula, the supposed rate schedule according to which petitioner was to receive compensation. (R. 447, 514-20.)

Statements had been given by Biow and Zinneman to agents of the Bureau of Internal Revenue substantially the same as their testimony at the trial. In this state of circumstances, it became a matter of crucial importance to petitioner to show that Biow's and Zinneman's version of the character of the disbursements from the Biow Company to petitioner was a fabrication.

Upon cross-examination Biow admitted speaking to Mr. Alfred B. Lyon, then President of Philip Morris Company, a day or two after Zinneman had shown petitioner the statements which Biow and Zinneman had given the agents of the Bureau of Internal Revenue. (R. 408.) Biow, however, denied telling Lyon that it was entirely his fault and that he and Zinneman had done wrong. He further denied suggesting to Lyon an arrangement for putting petitioner on his payroll for a period of five years to undo the wrong he had done petitioner. He gave his full version of the conversation, which was highly favorable to the government. (R. 408-412.)

When this identical conversation became the subject of questions put to the witness Lyon when he appeared for the defense, the petitioner was denied the right to show Lyon's version of it. (R. 1316-7.)

The testimony sought to be elicited from Lyon was admissible as impeachment of Biow in respect to a matter vital to the government's case. Its exclusion is prejudicial error. *Gordon v. United States,* 344 U.S. 414, 73 S.Ct. 369 (1953); *People v. Raven,* 44 Advanced Cal. 548 (1955). It was also admissible as material evidence relat-

ing to petitioner's defense that disbursements involved were taxable to the Biow Company and not to petitioner.

Regarding impeachment, Biow was given the time, place and people involved; he was particularly asked whether he had admitted making a statement and of doing wrong; he was particularly asked whether he had suggested the matter of putting petitioner on his payroll. The circumstances were so clearly pointed out to him that it was impossible for Biow not to understand the conversation to which the questions related. He denied making the statements and made a full and lengthy explanation of what he did state. Petitioner thus complied with every possible requirement relating to the laying of a foundation.

The Charles Morgan, 115 U.S. 69, 77, 5 S.Ct. 1172 1885);

Burton v. United States, 175 F. 2d 960, 965 (5 Cir. 1949);

United States v. Dilliard, 101 F. 2d 829, 837 (2 Cir. 1938);

Gordon v. Thomas, 70 F. 2d 752, 753 (C.A.D.C. 1934).

Quite apart from impeachment, petitioner was deprived of his right to prove the conversation between Lyon and Biow as substantive evidence in his own behalf.

The disbursements were either taxable to petitioner or to the Biow Company. This was a clear cut issue throughout the trial. The rejected testimony related to the main fact in dispute. It was the right of petitioner to produce as relevant, competent and material, evidence

of actions, conversations and conduct of Biow which tended to prove a confession or admission that he had wrongfully avoided the payment of taxes on the disbursements to petitioner. Though it was urged to the court below that this was affirmative evidence for petitioner the matter was pointedly left undecided. (R. 2124.)

The extra-judicial confession of a third party to the crime for which a defendant is on trial has been held by this Court, Holmes, Lurton, and Hughes dissenting, to be inadmissible hearsay. *Donnelly v. United States,* 228 U.S. 243, 33 S.Ct. 449 (1913). The point has not been mentioned in any opinion of this Court since the *Donnelly* case, supra, forty-two years ago.

The outstanding authority in the United States upon the American system of evidence argues for the abandonment of the rule, remarking that it

> "• • • is an intellectual disgrace to our system of evidence."

It is, he says, a "barbarous doctrine." 5 Wigmore 3rd Edition, Section 1476. Some state courts have recently discarded this archaic rule which denies a defendant in a criminal trial one of the most effective weapons of defense it is possible for him to possess. *People v. Lettrich,* 413 Ill. 172, 108 N.E. 2d 488 (1952); *Thomas v. State,* 186 Md. 446, 47 Atl. 2d 43 (1946); *Sutter v. Easterly,* 354 Mo. 282, 189 S.W. 2d 284 (1945). It is urged that this Court should re-examine and reverse the holding of the *Donnelly* case.

6. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PETITIONER BY ALLOWING THE GOVERNMENT TO INTRODUCE IN GREAT LENGTH NEITHER RELEVANT NOR MATERIAL EVIDENCE IN REBUTTAL, CONSISTING OF OPINION EVIDENCE THAT THE ENDORSEMENTS ON THREE CHECKS ISSUED BY THE BIOW COMPANY WERE THE HANDWRITING OF OTHERS WHO WERE MERELY KNOWN TO PETITIONER.

Zinneman testified in the case in chief of the government that Exhibits 41, 44 and 51 were checks given petitioner under the same circumstances he gave the other checks to him. He claimed that petitioner supplied the names of the payees and the amounts of the checks (R. 563-4, 567, 569), and that the checks were given petitioner as commissions (R. 570-1). Zinneman added with regard to Exhibit 41 that he cashed that check for petitioner and gave the proceeds to petitioner at his request. (R. 564-5.)

Petitioner denied receiving the check marked Exhibit 41. (R. 1412-13.) He could not recall receiving the checks marked Exhibits 44 and 51. (R. 1415-16, 1419.) The rebuttal consisted first of testimony from Robbins and Benjamin identifying specimens of their own handwriting and of King, who said he was present when Benjamin wrote out his handwriting sample. (R. 1716-27.)

Thereafter, the witness Sellers expressed the opinion that Benjamin endorsed Exhibit 44 (R. 1756) and Exhibit 41 (R. 1765) and that Robbins endorsed Exhibit 51 (R. 1738). No mention was made of petitioner.

When, after 68 pages of testimony, the rebuttal was concluded, no evidence was produced (1) showing that petitioner had received taxable income represented by the three checks, or (2) impeaching petitioner on any material matter.

The testimony was not admissible because it was not relevant. The issue was whether petitioner received the checks, or the moneys represented by the Biow checks, as compensation and filed tax returns excluding that money, with the specific intent to defeat and to evade the tax due. Petitioner confirmed receiving 36 of the 39 checks in question. Concerning two of the checks, petitioner did not deny receipt of them but stated simply that he did not recall whether he had or not. He denied only the one check. As purported rebuttal to this testimony, the opinion evidence of Sellers constituted no more than secondary evidence from which must be drawn a series of inferences so tenuous that the opinion basis for them should never have been admitted. The fact basis for the first inference is the opinion that Robbins and Benjamin signed the checks. From this, one is asked to infer that these witnesses got the checks from petitioner. The next inference is that petitioner received the moneys represented by the checks. The next is an inference that petitioner received the checks as compensation. Then, of course, there must be urged the further inference that petitioner knew the moneys represented by the checks were compensation and, with this knowledge, intended to defeat and evade the tax due upon those sums.

The Court of Appeals held that this evidence was relevant. (R. 2125.) On the contrary the string of inferences called for by this testimony is unlawful.

Sapir v. United States, 216 F. 2d 722 (10 Cir. 1954);

Travelers Ins. Co. v. Warrick, 172 F. 2d 516, 519 (5 Cir. 1949);

United States v. Outer Harbor Dock & Wharf Co., 124 F. Supp. 337 (D.C. S.D., Calif. 1954); *Tucker v. Traylor Engineering & Manufacturing Co.*, 48 F. 2d 783 (10 Cir. 1931).

Moreover, it breaks with the very first one sought to be drawn. The only legitimate inferences as to the sources of Robbins' and Benjamin's possession of the checks is that they received them directly from the Biow Company or from some other person. The membership of petitioner in the latter class is as close as the inference can come to the issues in this case.

This evidence was put in as rebuttal purely for effect. All of it was available to the prosecutor during his case in chief. Sellers stated that he had been working on the matter of the handwriting since June 15, 1953, three months before trial. He had made his comparisons before the trial started. (R. 1771-2.) Benjamin had stated earlier during cross-examination that the government had the exemplars he was questioned about when he was on the witness stand during the prosecution's case in chief. (R. 1725-6.) This display saved for rebuttal was no more than an effort to place before the jury as the final evidence in the case a grandstand performance as a substitute for proof. See *United States v. Sager*, 49 F. 2d 725, 730 (2 Cir. 1931).

7. THE PROSECUTOR WAS GUILTY OF ASSIGNED PREJUDICIAL MISCONDUCT IN ARGUING TO THE JURY THAT PETITIONER HAD THE DUTY OF CALLING HIS SECRETARY TO CORROBORATE HIS OWN UNCONTRADICTED TESTIMONY THAT SHE WAS THE RECIPIENT OF THREE CHECKS AS GIFTS FROM THE BIOW COMPANY.

Dorothy Ready was the secretary to petitioner. Petitioner testified that he had given her certain of the Biow checks drawn to her order. Although under subpoena to testify for the government, she was never called to the stand. The Assistant Attorney General in the opening argument to the jury, after he commented that petitioner had testified that he gave certain checks to her, pointedly commented "Miss Ready was not called as a witness in this case. Miss Ready was a secretary of this defendant." When petitioner assigned this as misconduct the prosecutor argued, "I have not stated, Ladies and Gentlemen, whose duty it was, but this witness was available to defendant, I submit." (R. 1846.) This was held not error. (R. 2125.)

The decision of the Court of Appeals in this case is in direct conflict with its holding in a similar case, *Himmelfarb v. U. S.*, 175 F. 2d 924 (9 Cir. 1949), and *Dunn v. U. S.*, 50 F. 2d 779 (9 Cir. 1931), Affd. *Dunn v. U. S.*, 284 U.S. 390, 55 S.Ct. 189 (1932). In addition to the problem of a conflict within the Ninth Circuit on this subject, there is underlying this question whether or not there is a burden on a defendant to prove any fact or produce any witness.

The testimony of Dorothy Ready if called by petitioner could have been no more than corroborative or cumulative of the testimony of petitioner. The inference

flowing against one who fails to produce evidence peculiarly available to him cannot fairly be drawn except from the non-production of witnesses whose testimony would be superior in respect to the fact to be proved.

2 *Wigmore, Evidence* (3d Ed. 1940), §§ 288, 287;

Morton v. United States, 147 F. 2d 28, 31 (C.A. D.C. 1945);

Gibson v. Kennedy Extension G. Min. Co., 172 Cal. 294, 305; 156 P. 56 (1916);

Pointer v. Pointer, 251 S.W. 2d 334, 338 (1952);

Montgomery v. Chesapeake & P. Tel. Co., 121 W. Va. 163; 3 S.E. 2d 58, 61 (1939);

Wright v. Safeway Stores, 7 Wash. 2d 341; 109 P. 2d 542 (1941); 135 A.L.R. 1367.

Quite apart from the fact that Miss Ready's testimony would have been corroborative only, inasmuch as she was under the subpoena of the prosecutor it is questionable whether she could be considered peculiarly available to petitioner. *Erie R. Co. v. Kane*, 118 Fed. 223 (6 Cir. 1902). Indeed, the fact that she was under government subpoena and not called supports an inference exactly opposite to that argued by the prosecutor here—an inference that the government failed to call Miss Ready to rebut petitioner because it feared her testimony would confirm petitioner's position and further discredit the government's case.

By the holding here, a defendant is subjected to an inference that witnesses not called by him would testify adversely to him if, without proof of any kind, it appears that they are peculiarly available to him. Here in effect the petitioner's testimony was rebutted by a presumption

that the testimony of Dorothy Ready was adverse to his, a presumption that arose when he failed to call her. The burden of proof is thus shifted to the defendant contrary to well established principles.

United States v. Phillips, 217 F. 2d 435 (7 Cir. 1954).

CONCLUSION.

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 1, 1955.

HAROLD C. FAULKNER,
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Of Counsel:
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(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

ARTHUR H. SAMISH, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,261 May 20, 1955

On Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, Chief Judge, CHAMBERS, Circuit Judge, and CLARK, District Judge.

CHAMBERS, Circuit Judge:

Arthur H. Samish appeals from his conviction on eight counts of an indictment charging him with wilfully attempting to defeat and evade payment of income taxes.

The alleged income which he did not report on his income tax returns for the years 1946, 1947, 1948, 1949, 1950 and 1951[1] concerns a series of checks drawn by the

[1]Samish, a resident of California, filed separate returns for himself and his wife, Merced C. Samish, for the years 1946 and 1947, splitting community income between the returns. For the years 1948, 1949, 1950 and 1951 he filed joint returns. Each of the eight returns was the subject of one count in the indictment.

Biow Company, a New York advertising agency. The checks varied in amounts from $950 to $5,000.[2] At first the checks were payable to known Samish business associates, relatives or simply friends. Later the checks as issued were written to fictitious payees. With two or three exceptions, Samish admits receipt of all the checks. Only one does he deny receiving.

In 1943 the defendant played some part in getting for the Biow Company a substantial portion of the advertising business of Schenley Distillers, a very fine account for an advertising agency. Samish was a friend of Louis Rosenstiel, chairman of the board of Schenley. The leading actors for Biow in the events with which this court is concerned were Milton H. Biow, president, and Morris Zinneman, treasurer. Biow's admit that in making the remittances to Samish, for whatever reason the checks were sent, they falsified their books in that they charged the amounts thereof to various radio, television, magazine and newspaper accounts. But orally they stoutly maintained the checks were given Samish as compensation for securing Biow the Schenley account. There clearly appears to have been sufficient testimony to withstand the motion for acquittal made by defendant at the end of plaintiff's case.

Defendant, as well he may, admits that the evidence is sufficient to sustain the jury's verdict. On the issue of unreported income, it can be said that it is overwhelming.

From a practical standpoint the defense of Samish was to "try" Biow. And if Biow's low standard of morality

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[2]The total of all checks proved was about $90,000.

as shown in the record is any excuse for Samish, then Samish ought to go free.

Many of appellant's assignments of error concerned the Biow testimony in one way or another. But first it seems proper to deal with Samish's story about the checks. Eventually Samish, in defense, took the stand.

Extensively, portions of the Samish testimony are set forth seriatim, either verbatim or summarized narratively:

1. In a preliminary conversation with Al Lyon, president of Philip Morris Co., in 1944, Lyon said to Samish regarding Biow's obtaining the Schenley account, "You are entitled to a finder's fee or some monies." Samish replied, "Al, I am not interested in receiving anything for myself; I represent Schenley interests; I can't—I can't take anything." Said Lyon, "Well, don't be a fool. You are entitled to something. You have got a lot of political contributions to make." Said Samish, "I have some very fine personal friends, too."

2. Soon after, Samish saw President Biow, and Samish says Biow said, "Art, we are very appreciative of getting this Schenley account." Samish continues that Biow told him that Mr. Lyon had talked to him about some political contributions and gifts and said that if he (Samish) would go to Mr. Zinneman he would have some checks for him.

3. Shortly thereafter, Samish was dealing with Zinneman, Biow's treasurer, and Zinneman reported, according to Samish, that Biow had talked to him, and Zinneman asked Samish for the names for some checks. Samish says that he suggested the use of his name. Zinneman pro-

tested that he didn't want Samish's name and that he didn't even want Samish to endorse the checks for reasons which Zinneman said were his business. Thereupon, Samish gave him some names for checks.

4. One of the first checks received by Samish was in the amount of $2500 payable to his secretary, Dorothy L. Ready. Of this he says, "I made a present to her as a gift to her from Mr. Biow."

5. Another check was handed by Samish to one Miss E. Mack. Samish says it was given to Miss Mack "as a gift from Mr. Biow."

6. Another check, says Samish, was handed to Mr. Frank Howard as a gift from the Biow Company.

7. Another check, in 1948, says Mr. Samish, was given to Miss Ready "as a gift from Mr. Biow."

8. In 1949, says Samish, he "handed a $2500 check to Miss Ready as a gift from the Biow Company."

9. Another check, in 1949, went to F. Howard, Samish's son-in-law, "as a gift from the Biow Company."

10. In 1950, a check went to A. Robbins, a friend of Samish, "as a gift from the Biow Company." Following the testimony concerning some of these presents, including the Robbins check, Samish said, "Well, the reason being . . . the three or four—I think it is four—that I gave these gifts to were close friends and people who I liked and people who I wanted to do something for, like I have done for many other people."

11. The checks used for political purposes and payable to fictitious payees, Samish related he was able to cash at various places without himself making any en-

dorsement thereon. Generally, he said, the proceeds of the checks went into an envelope or political "kitty" which he usually kept in his safe, although he did make some distribution of the proceeds of checks which he cashed for political purposes in New York without taking the checks to the envelope in his safe in San Francisco where he ordinarily kept the "kitty." Generally Samish could not identify the political recipients of the proceeds of the checks which he reported were used for political purposes.

12. At another point in his testimony concerning the transactions with President Biow, Samish testified as follows: "I recall some kind of a conversation wherein he stated that he wanted to compensate me or something of that sort and I very definitely told him that under no circumstances can I accept any compensation. I had no objection if he wanted to put me on his payroll or anything, but as Mr. Lyon stated, and I stated to Mr. Lyon at the time, that I explained to Mr. Biow that— * * * I told Mr. Biow at the time during that conversation that under no circumstances could I receive any compensation from him for the help of securing any account, or—and he further stated to me during some conversation, during the talk with Mr. Lyon, and I reiterated, that while I couldn't receive any compensation, if he wanted to make some political contributions or some gifts to some friends of mine who I would indicate, that that was entirely up to him."

13. It further appears from the Samish testimony that Treasurer Zinneman did not know any of the live payees, and that Zinneman showed no interest in the identity of the payee. Further, in the early stages of the series of

check transactions, Samish furnished all of the names of the payees.

14. Samish was asked if he remembered any political campaigns in which the Biow Company had any interest whatsoever. He replied, "What would they have an interest in campaigns for?" Then he was asked, "These were political contributions that were to be made for the Biow Company, were they not?" His response was, "Not to my knowledge." Then, to the question, "They were political contributions to be made by you, is that correct?" he responded, "They were political contributions. I don't say the year 1944, but whenever they were made, given to me to use at my discretion." Then, following the question, "In any way that you saw fit, is that right?" he answered, "Well, I would think so, having in mind they had a full knowledge that I was concerned about political contributions."

15. Again, Samish was asked, "Do you know of any campaign in California in 1944 in which the Biow Company had an interest?" To this he replied, "I would say no."

16. Again concerning the earlier checks, Samish said, "Well, I believe that Zinneman would call me and ask me for some names and I would give them to him." Samish, however, contends that all amounts were fixed by the Biow Company.

17. Later on, Samish testified that many names he supplied Biow were the names of persons that "I had some knowledge of, that I was sure wouldn't have any objection to their name being used." At another time Samish says, "The Biow money, the Biow political con-

tributions, made it possible for me to be more generous at times with political contributions than I could ordinarily be."

18. To the question, "Did you feel there was anything wrong about the fact that you were taking money from the Biow Company," Samish replied, "No, sir."

19. Again, the Biow money "was just an accumulation of money that was there [in Samish's safe] to be used for political purposes—political campaigns."

This court is of the opinion that Samish's own testimony concerning all of the checks except four shows almost conclusively that the money (the four checks excepted) received from the controversial checks was taxable income. One begins with the business background. Samish, without question, had done Biow a huge business favor. Biow offers to pay Samish. Can Samish avoid tax liability by saying, "You can't pay me. But you can make some gifts to friends of mine [not yours]. Give me the checks. Let me present them. And you can also give me some political money"? Someone owned the checks at the moment they were in Samish's hands. That man was Samish. Someone owned the proceeds of the political checks while he held the proceeds. That owner was Samish until he disbursed them. See Old Colony Trust Co. v. C.I.R., 279 U.S. 716. The facts might admit of some other conclusion if Biow had any knowledge or affection for any of those whom Samish describes as his "fine friends" who received some of the "gift" checks. As to the "political" checks, the result might be otherwise if Samish had not stated that Biow had no interest in Samish's political operations. It is negatived that Biow

had any political objectives, either generally or specifically, in California or anywhere else. Biow did not even say, "You know what we believe in. Put our money where you think it will generally vindicate what we believe in."

It well may be that the testimony of Samish as to the "whys" and "hows" of the Biow checks is untrue. Certainly it stretches human credence to believe that he knew so little as he said he did about the proceeds of any given "political" checks. And it amazes one to hear that he would be able time after time to cash checks made to fictitious payees without a word of explanation to the person cashing as to the lack of endorsement.

On the whole, this court deems that the Samish "alibi" is almost a judicial admission from the witness stand that the checks (four excepted) were income. Certainly the defendant is not entitled to a better set of facts than he unmistakably claims them to be.

Judicial admissions from the stand are something to be accepted cautiously as concluding an issue. For example, if testimony of a defendant as to a fact is essentially one of opinion, such as speed, the time a car entered an intersection, the point of impact, undoubtedly a party is entitled to have the jury consider more favorable testimony than his own.

However, here had Samish paid his taxes, sued the collector for his taxes back, as he tells the story a trial judge might have been justified in instructing the jury that these particular "gifts" and "contributions" to Samish or through Samish were Samish's income. It appears that the opinion of Mr. Justice Douglas in Robertson v. United States, 343 U.S. 711, 713, almost goes this

far.[3] However, this court is not sure that the opinion positively eliminates the element of intent on the part of the payor, Biow. Therefore, this decision will assume that the intent of Biow remained material to the issue of income or gift. But this court does not hold that one who has performed services of value to another for which he is entitled to be paid—which the recipient proposes to pay—can remove the payments from income to gift by his unilateral act of saying, "Don't pay me. Just give me some sizable gifts."

Even if the trial court would have been justified in telling the jury that the checks (four excepted) represented reportable income, that would not amount to a directed verdict in favor of the government. Even when there are no issues left for a defendant, a jury has the power to find the defendant not guilty.

And if Samish's own testimony proved the payments were taxable, he would not be stripped of defenses. The question of wilfully attempting to defeat and avoid payment would be still wide open. For example, Samish says his tax consultant had all the facts as to the checks from Biow. He relied on the tax consultant, now dead. He paid no attention to the returns, he said, except to look for the "X" on the signature line where he was supposed to sign. If the jury believed this portion of the alibi, certainly there was nothing wilful about his failure to report and pay.

Defendant's first major assignment of error concerns the fact that the United States attorney in his opening

[3]See also Noel v. Parrott, 4 Cir., 15 F.2d 669.

statement told the jury that he would prove that appellant gambled a million and a half dollars in the year 1949 and won $25,000 which he failed to report in his income tax return. In aggravation of this statement, says the defendant, three witnesses laid a foundation (or attempted to) for the admission of certain gambling house records which tended to connect Samish with certain betting transactions. Countering this, the government says the records were admissible and were improperly excluded. Whether the records were admissible will not be here decided beyond saying that the records presented a very close question as to whether they should be received. A very important consideration in determining whether the defendant had a fair trial is to ascertain if the government was overreaching. An examination of the record indicates that the records were such that the United States attorney had a duty to try his level best to get the records in evidence. If he failed, should that result in a mistrial? One necessarily must read the whole record. First, with respect to the residual effect in the jury's mind after the foundation testimony of the three witnesses was stricken, it is doubtful under all the circumstances if there was any prejudice to the defendant. The trial judge considered whether any prejudice had been done and instructed the jurors to disregard the testimony. The collapse of the government's witnesses probably inflicted damage only on the government. Generally the defense so quickly and successfully moved the case back into the yard of Biow for so much of the time and the issues for days after left this matter of the "gambling income" so far behind that only a captious appraisal of the case

would hold that these early incidents of the case were prejudicial.

Defendant complains of a schedule prepared by a revenue agent summarizing the evidence concerning the many Biow checks sent to Samish. Items of the summary listed the check number, date of check, Samish's whereabouts on date of issue, what evidence (Samish's travel record or hotel record) pointed to Samish's whereabouts on the date in question, the amount of the check, the name of the drawee bank, the date cashed or deposited, the record as to Samish's whereabouts on the latter date, and a list of endorsements on the various checks. The receipt of the summary as to the checks seems entirely proper. Wigmore on Evidence, 3d Ed., Sec. 1230. Papadakis v. United States, 9 Cir., 208 F.2d 945; United States v. Kelley, 2 Cir., 105 F.2d 912. But assuming arguendo that the exhibit was improperly admitted, it cannot be said that the summary in any way weakened Samish's two main points that the checks were gifts and that his failure to report the payments, if they were reportable, was the fault of his tax consultant.

Samish assigns as error the fact that he was not permitted to impeach, by the witness Lyon, Biow's version of a telephone conversation, Biow on one end and Lyon and Samish successively on the other. Biow and Samish told diametrically opposite stories as to whether in certain conversations Biow admitted he had wronged Samish by certain written statements he and Zinneman had given to internal revenue agents. The statements generally were in accord with the Biow testimony given later upon the trial. It appears that the Biow testimony was probably

of such materiality as to be impeachable by contradictory statements. Even the alleged statements of Biow might have furnished affirmative evidence for Samish. (The latter point is not decided.) But a reading of the testimony and the record of the colloquy of court and counsel leaves this court with an abiding doubt as to whether the trial court did reject the testimony on the ground an inadequate foundation had been laid or other grounds. A trial judge in determining the sufficiency of a foundation necessarily must be permitted considerable latitude.[4] While the court was rather firm in its rulings on the testimony, it would not be appropriate to find error in the rulings unless there were a better showing of a foundation. For example, counsel for appellant, while interrogating Lyon, apparently misspoke and used the wrong date by two months as the date of the conversation. Perhaps the court knew what conversation counsel meant, and again, it might not have. Hence in the condition of the record a contention of error cannot be sustained.

Furthermore, assuming the exclusion was error, it is to be pointed out that Samish had on many points impeached Biow. The testimony, if admitted, does not produce the belief that it would have tended to swing the scales. The whole evidence of the case is so overwhelming against Samish and particulary his own story, so difficult of belief, was so damning that it doesn't appear that Samish was hurt by a ruling which limited him to showing on one more point that Biow was unworthy of belief. Little doubt can there be that if the jury had had Biow

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[4]United States v. Angelo, 3 Cir., 153 F.2d 247; Atlantic Greyhound Corporation v. Eddins, 4 Cir., 177 F.2d 954.

within its reach it would have found him guilty of most any charge selected at random.

Error is assigned in permitting the noted handwriting expert, Clark Sellers, to present opinion testimony on rebuttal that three checks, the receipt of which was questioned by Samish, had been endorsed in the handwriting of associates of Samish. It may be assumed that the testimony would have been proper for the case in chief. But certain testimony may be proper both in chief and in rebuttal. The offering of the testimony at the beginning may not seem necessary at the moment, and while prosecutors have a duty to play fair with defendants, it is not unfair to offer testimony on rebuttal which is proper rebuttal, although it might have been offered in chief. Also, whether the point was to be proved by Sellers or by other witnesses is within the prosecutor's discretion. The contention that Sellers' testimony was not material is without merit. Much of the complaint of Samish about Sellers is that Sellers was a great showman. But no indication appears in the record of any impropriety on the part of the witness. How could a rule be sustained excluding a witness because he is a good actor? Such a rule might also be extended to good actors who are defense attorneys or prosecutors.

Next the defendant complains that the prosecutor commented in argument to the jury that Dorothy Ready was Samish's secretary and he had not called her as a witness. Actually she was held throughout the trial on a subpoena issued at the request of plaintiff. Defendant promptly complained about the remarks, but the court did nothing about the complaint. Reliance is placed upon

Himmelfarb v. United States, 9 Cir., 175 F.2d 924. In Himmelfarb it appears the witnesses not called probably were witnesses with no particular connection with either side of the case. Practically and legally the witnesses in Himmelfarb were available to either side of the case. Here in the context of the district attorney's reference to Miss Ready there appears that little damage could have been done to the defendant. Furthermore, it would seem that any rules restricting comment on failure to produce witnesses should be restricted to those who are available both legally and practically to one side. Wigmore on Evidence, 3d Ed., Sec. 288. To say that Miss Ready was equally available to both sides is to ignore plain facts. Miss Ready was the faithful secretary to Samish for years. He so testified. It is not to reflect on her integrity to say that she undoubtedly continued to see events through his eyes. The relationship here is like that in United States v. Beekman, 2 Cir., 155 F.2d 580, where a party's employee was held not equally available to his opponent as a witness and the court found no error in his opponent's comment on the failure to call him. Also, Samish's failure to call his secretary well could have been because he feared her testimony under cross-examination might increase the evidence that the creation of the check payees was a farcical deception making clearer the payments to Samish as income to him and possibly show to the jury her belief in his guilt.

The court gave the following instruction:

> "The law does not require that any taxpayer segregate his deductible expenses in any way, nor that any deductible expenses be carried on the taxpayer's

books under any particular account name. *If an item of expense, such as commissions, is included in the total deductible expenses on any taxpayer's books, it is immaterial under which particular deductible expense account it might appear.* All ordinary and necessary expenses incurred in carrying on a business, including compensation for personal services rendered, are allowed as a deduction." (Italics added.)

The defendant complains vigorously of the giving of this instruction.

Better would it have been if the instruction had not been given. It does seem to pass lightly over the keeping of dishonest books.

Looking for a moment at the fact issues involved, it seems that the books were admis ble at the outset to show the intent of Biow in the matter. The false books show an intent to treat the payment as business expense. Possibly they are also susceptible of some inference that Biow intended to make Samish presents of the questioned checks. It is doubtful if any juryman, instructions notwithstanding, would still think Biow kept his books honestly or that the court had told him that Biow did. At any event, in view of the overwhelming testimony of the whole case, it is not to be said that the instructions were prejudicial to the defendant. But under the instructions as a whole, it appears that the jury was still entitled to use the false books as evidence of an intent to make a gift. Read in the light of all the instructions, the one in particular complained of now has been overemphasized by appellant. Further, the interpretation of defendant begs the question. Read the instruction closely. The effect is:

No harm is done if a taxpayer puts a deductible item under the wrong class of deductions, it is still deductible. The instruction does not purport to say the checks were not gifts or that it cannot be inferred from the false bookkeeping that the items were gifts. The instruction begins, "If an item of expense such as commissions, etc." This did not tell the jury that the checks were properly entered as commissions. The defendant exploited to the Nth degree the misdeeds of Biow. This instruction did not stop him or seriously cramp him.

Also, complaint is made of this instruction:

> "If you find it to be a fact that the Biow Company charged to business expenses any payments that you may find to have been made to the defendant, you may consider that fact among other facts in determining whether or not the Biow Company intended such payments to be gifts."

This instruction permits the jury to consider how the entries were made. If the books were admissible, as they were, the instruction was proper. A close reading of the instruction would indicate that the instruction lets the jury find either "gift" or "no gift." Furthermore, the instruction looks far more appropriate in context, which always must be considered.

The court failed to give three instructions suggested by defendant. As to these instructions, defendant gave no ground for his exception when he excepted. Disregarding this failure, the court's choice was correct. One instruction was adequately covered elsewhere. The giving of the instruction would have placed emphasis on certain testimony to which emphasis defendant was not entitled. The

other two instructions concerned matters which were not real substantial issues in the case.

Lastly, the defendant complains that the indictment was insufficient and, alternatively, that he was entitled to a bill of particulars. In essence, the indictment charged how much taxable income the defendant failed to report each year in question but did not specify the source or detail of particular income omitted. Defendant is concluded on this matter by this court's decision upholding a similar indictment in the Himmelfarb case, supra.

On the whole record, it appears that defendant had a fair trial. If there be slight error in the record, it could not have changed the outcome in this case, in this court's view.

Defendant's representation below and here was exceptionally good. Defendant, as most defendants must, made the hard choice as to whether he would take the witness stand. He elected to do so. If his story is true, objectively he almost admits guilt. He pretty well discredited Biow and he was able to exploit almost without limit the providential (for him) circumstance of Biow's false books.

Primarily this decision rests upon this court's belief that there was no error below, but secondarily it rests upon the conclusion that if there was error in the rulings on any or all of plaintiff's three main contentions[5] then

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[5]The subjects of these contentions were:
(a) The references to gambling activities of Samish in the prosecutor's opening statement and the foundation testimony to show gambling activities (later stricken);
(b) Exclusion of some testimony of the witness Lyon which might have further impeached Biow;
(c) The court's instructions which doubtless referred to Biow's books.

it was harmless under the standards laid down in Kotteakos v. United States, 328 U.S. 750. The main debatable issue really was the matter of wilfulness. This the jury, properly instructed, found against Samish.

The defendant has been fairly convicted.

The judgment is affirmed.

(Endorsed:) Opinion. Filed May 20, 1955.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Arthur H. Samish, Appellant, vs. United States of America, Appellee.	No. 14,261

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration thereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and Entered: May 20, 1955
PAUL P. O'BRIEN, Clerk.

STATUTES AND REGULATIONS INVOLVED.

Section 41 of the Internal Revenue Code provides:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year." 26 USCA § 41.

Section 145(a) of the Internal Revenue Code provides:

"Failure to file returns, submit information, or pay tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collec- of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000,

or imprisoned for not more than one year, or both, together with the costs of prosecution." 26 USCA § 145(a).

Section 145(b) of the Internal Revenue Code provides:

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." 26 USCA § 145(b).

U. S. Treas. Reg. 118, § 39.54-1 (1953). Records and income tax forms.

"(A) Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under Chapter I. * * *"

Filed 10-28
C. W. Calbreath, Clerk
By G. B. D
Deputy Clerk

DATE OF CHECK	SAMISH WHEREABOUTS THIS DATE	SUPPORT	PAYEE	AMOUNT OF CHECK	BANK ON WHICH DRAWN	DATE CASHED OR DEPOSITED	SAMISH WHEREABOUTS THIS DATE	SUPPORT	ENDORSEMENTS
12/11/46	New York	Travel Hotel	D. L. Ready	($2,500.00)					
12/11/46	New York	Travel Hotel	Wm. Cody	1,650.00)	Only photostats of front side of these checks were available.				
12/31/47	San Francisco	Travel	E. Mack	2,500.00)					
				$6,650.00					
7/15/48	New York	Travel Hotel	E. Robbin	$ 3,450.00	The National City Bank of New York	7/17/48	Los Angeles	Travel	E. Robbin, Al Robbins - Bank of America, 16-193, Los Angeles, California
7/15/48	New York	Travel Hotel	J. Arena	4,500.00	The National City Bank of New York	---			(Only photostat of the front side of this check was available
7/16/48	New York	Travel Hotel	E. Mack	2,250.00	The National City Bank of New York	---			(Neither the check nor photostat were available) Calif.
12/22/48	San Francisco	Travel	E. Mack	1,500.00	The National City Bank of New York	1/8/49	Los Angeles	Travel	E. Mack, Helen Mack, Bank of America 16-193, Los Angeles,
12/22/48	San Francisco	Travel	Frank Howard	2,250.00	The National City Bank of New York	1/6/49	Los Angeles	Travel	Frank Howard, Carolyn Howard - American Trust Co. 11-24, San Francisco, Calif.
12/22/48	San Francisco	Travel	D. L. Ready	2,500.00	Lawyers Trust Co., New York, N.Y.	1/5/49	Los Angeles	Travel	D. L. Ready - American Trust Co. 11-24, San Francisco
			Total 1948	$16,450.00					
3/22/49	Sacramento	Travel	Tevis Morrow	$ 5,000.00	Lawyers Trust Co., New York, N.Y.	3/30/49	Sacramento	Travel	Tevis Morrow - Bank of America 90-1400, Beverly Hills, Calif.
10/25/49	New York	Travel Hotel	N. Kelly	2,300.00	Lawyers Trust Co., New York, N.Y.	11/7/49	11/6/49 left New York	Travel Hotel	N. Kelly, Copacabana, Inc., Guaranty Trust of New York 1-23
10/25/49	New York	Travel Hotel	J. Benjamin	2,100.00	Lawyers Trust Co., New York, N.Y.	12/5/49	12/3/49 Shreveport, La.	Travel	J. Benjamin, Delta Associates - Progressive Bank & Trust Co., 14-72, New Orleans, La.
10/25/49	New York	Travel Hotel	R. Cody	3,500.00	Lawyers Trust Co., New York, N.Y.	12/5/49	12/3/49 Shreveport, La.	Travel	R. Cody, Delta Associates - Progressive Bank & Trust Co., 14-72, New Orleans, La.
12/28/49	San Francisco	Travel	D. L. Ready	2,500.00	Lawyers Trust Co., New York, N.Y.	12/31/49	San Francisco	Travel	D. L. Ready, American Trust Co., 11-24, San Francisco
12/28/49	San Francisco	Travel	A. Fox	2,480.00	Lawyers Trust Co., New York, N.Y.	1/13/50	Los Angeles	Travel	A. Fox, Helen Mack - Bank of America 16-321, Hollywood, Calif.
12/29/49	San Francisco	Travel	F. Howard	2,500.00	The National City Bank of New York	1/11/50	Los Angeles	Travel	F. Howard - The San Francisco Bank 11-55
			Total 1949	$20,380.00					
5/15/50	New York	Travel Hotel	R. Cody	$ 2,500.00	The National City Bank of New York	6/26/50	Reno, Nevada	Travel Hotel	R. Cody, Joe Hornstein, The Security National Bank of Reno, 94-9, Reno, Nevada.
5/15/50	New York	Travel Hotel	A. Rosen	2,500.00	The National City Bank of New York	5/25/50	Los Angeles	Travel	A. Rosen, C. Baxter - Hollywood State Bank 90-984, Hollywood, Calif.
5/15/50	New York	Travel Hotel	A. Fox	2,500.00	Lawyers Trust Co., New York, N.Y.	6/26/50	Reno	Travel Hotel	A. Fox, Joe Hornstein - The Security National Bank of Reno 94-9, Reno, Nevada
5/15/50	New York	Travel Hotel	A. Robbins	2,500.00	Lawyers Trust Co., New York, N.Y.	5/25/50	Los Angeles	Travel	A. Robbins, C. Baxter - Hollywood State Bank 90-984, Hollywood, Calif.
10/16/50	New York	Travel Hotel	A. Fox	2,500.00	The National City Bank of New York	11/6/50	San Francisco	Travel	A. Fox, Flamingo Commissioners - Bank of Nevada 94-65, Las Vegas, Nevada
10/16/50	New York	Travel Hotel	R. Cody	2,500.00	The National City Bank of New York	11/3/50	New York	Travel Hotel	R. Cody, Flamingo Commissioners - Bank of Nevada 94-65, Las Vegas, Nevada
10/16/50	New York	Travel Hotel	A. Robbin	2,500.00	The National City Bank of New York	10/26/50	New York	Travel Hotel	A. Robbin, Vincent Sollazzo, Brooklyn Trust Co. - Modern Industrial Bank 1-796, Brooklyn, N.Y.
10/16/50	New York	Travel Hotel	F. Flynn	2,500.00	The National City Bank of New York	10/24/50	New York	Travel Hotel	F. Flynn, Vincent Sollazzo, Brooklyn Trust Co. - Modern Industrial Bank 1-796, Brooklyn, New York
			Total 1950	$20,000.00					
1/8/51	San Francisco	Travel	R. Cody	$ 2,500.00	Bankers Trust Co. 1-103, New York	1/31/51	San Francisco	Travel	R. Cody, Flamingo Sports Service, Bank of Nevada 94-65, Las Vegas, Nevada.
1/8/51	San Francisco	Travel	A. Robbins	2,500.00	Bankers Trust Co. 1-103, New York	1/31/51	San Francisco	Travel	A. Robbins, Flamingo Sports Service, Bank of Nevada 94-65, Las Vegas, Nevada
1/8/51	San Francisco	Travel	F. Flynn	2,500.00	The National City Bank of New York	1/31/51	San Francisco	Travel	F. Flynn, Flamingo Sports Service, Bank of Nevada 94-65, Las Vegas, Nevada
1/8/51	San Francisco	Travel	A. Fox	2,500.00	The National City Bank of New York	1/31/51	San Francisco	Travel	A. Fox, Flamingo Sports Service, Bank of Nevada 94-65, Las Vegas, Nevada
7/25/51	New York	Travel Hotel	J. Unger	2,500.00	Bankers Trust Co. 1-103, New York	8/3/51	New York	Travel Hotel	J. Unger, The Blow Co., Inc., M. Zimmeman, Treas. A. Hauptman, The National City Bank, 1-2, New York
7/25/51	New York	Travel Hotel	F. Kearn	2,000.00	Bankers Trust Co. 1-103, New York	8/5/51	Left 8/4/51 New York	Travel Hotel	F. Kearn, Copacabana, Inc., Guaranty Trust Co of New York 1-23, New York, N.Y.
7/25/51	New York	Travel Hotel	M. Kelting	1,000.00	Bankers Trust Co. 1-103, New York	8/13/51	San Francisco	Travel	M. Kelting, Sutphin Restaurant Corp., Jamaica National Bank 1-801, Jamaica, N.Y.
10/15/51	New York	Travel Hotel	George Green	2,000.00	The National City Bank of New York	10/19/51	New York	Travel Hotel	George Green, Midtown Commercial Corp., Royal Industrial Bank 1-797, New York, N.Y.
10/15/51	New York	Travel Hotel	A. M. Lewis	2,000.00	The National City Bank of New York	10/23/51	New York	Travel Hotel	A.M.Lewis, Hiram Sremco, Bernie Pass-Bank of Manhattan Co. 1-2, New York, N.Y.
10/15/51	New York	Travel Hotel	A. Cooper	1,500.00	The National City Bank of New York	10/16/51	New York	Travel Hotel	A. Cooper, Copacabana, Inc.-Guaranty Trust Co. of New York 1-23, New York, N.Y.
10/15/51	New York	Travel Hotel	J. Stoner	1,500.00	The National City Bank of New York	10/16/51	New York	Travel Hotel	J. Stoner, Jos G. Gerson, Hotel Artor - Bankers Trust Co. 1-103, New York, N.Y.
10/15/51	New York	Travel Hotel	F. A. Birch	1,500.00	The National City Bank of New York	10/31/51	New York	Travel Hotel	F. A. Birch, Jos. G. Gerson, Hotel Astor - Bankers Trust Co. 1-103, New York, N.Y.
10/29/51	New York	Travel Hotel	F. C. O'Connor	1,200.00	The National City Bank of New York	11/5/51	11/4 - New York 11/5 San Francisco	Travel Hotel	F. C. O'Connor, Copacabana, Inc., Guaranty Trust Co. of New York 1-23, New York, N.Y.
10/29/51	New York	Travel Hotel	F. Prender	1,200.00	The National City Bank of New York	10/30/51	New York	Travel Hotel	F. Prender, Copacabana, Inc., Guaranty Trust Co. of New York, 1-23, New York, N.Y.
10/29/51	New York	Travel Hotel	H. Frankel	1,000.00	The National City Bank of New York	11/29/51	San Francisco	Travel	H. Frankel, Midtown Commercial Corp.-Royal Industrial Bank 1-797, New York
10/29/51	New York	Travel Hotel	C. Clarke	950.00	The National City Bank of New York	12/26/51	San Francisco	Travel	C. Clarke, Morris Goldman-Anglo-Calif. National Bank, 11-1716, San Francisco, California
			Total 1951	$28,350.00					

WRITING CLOSE TO EDGE

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 294

ARTHUR H. SAMISH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i-xviii) is reported at 223 F. 2d 358.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1955. (Pet. App. xix.) A petition for rehearing was denied on July 8, 1955. (R. 2130.) The petition for certiorari was filed on August 4, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, petitioner was prejudiced by an instruction that the Biow Company was not required to enter deductible expense on its books under any particular deductible expense account.

2. Whether it was error to instruct the jury that, in determining whether the Biow Company's payments to petitioner were intended as gifts, the fact that the payments had been charged by Biow to business expenses could be considered among other facts.

3. Whether the prosecutor's treatment of evidence of certain gambling income to petitioner constituted reversible error, despite the trial court's instructions to the jury to disregard it.

4. Whether it was error for the trial court to admit a chart which summarized the evidence of payments by the Biow Company to petitioner.

5. Whether the trial court erred in excluding evidence of an alleged prior contradictory statement of the witness Biow.

6. Whether the trial court erred in permitting rebuttal testimony by a handwriting expert concerning three checks which petitioner denied receiving or could not recall.

7. Whether the prosecutor was guilty of prejudicial misconduct in referring to the fact that petitioner's secretary, who had allegedly received

several of the Biow checks as gifts, was not called as a witness.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On May 5, 1953, an indictment in eight counts was filed against petitioner in the United States District Court for the Northern District of California charging him with wilful attempted evasion of his own income taxes and those of his wife for the years 1946 to 1951, inclusive, in violation of the Internal Rev-

enue Code of 1939, Section 145 (b). The following deficiencies were alleged in the indictment[1] (R. 3–10):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1946 (husband)	$44,782.23	$20,265.60	$52,282.23	$25,186.40
1946 (wife)	44,782.23	20,574.35	52,282.23	25,528.40
1947 (husband)	42,312.48	19,263.46	49,812.48	24,252.73
1947 (wife)	42,312.48	19,591.21	49,812.48	24,594.73
1948	84,110.11	36,105.08	100,560.11	46,377.58
1949	86,923.90	36,816.30	102,303.90	46,227.76
1950	73,556.69	29,596.45	93,556.69	41,185.29
1951	88,653.17	44,165.92	117,103.17	64,906.59

After a jury trial petitioner was found guilty as charged and on December 9, 1953, he was sentenced to three years imprisonment and fined $40,000. (R. 131–133.) The Court of Appeals affirmed. (R. 2128.)

The evidence to support the verdict may be summarized as follows:

Petitioner was a close friend of the chairman of the board of Schenley Distilleries, Inc. (R. 1372, 1590, 1594.) In March 1943 Milton H. Biow, the head of an advertising agency, asked petitioner to help him obtain the Schenley account and promised to pay petitioner a broker's fee. Petitioner agreed to do what he could, and a short time later the Biow Company began receiving business from Schenley as a result of peti-

[1] For 1946 and 1947 petitioner and his wife filed separate returns. In the other years joint returns were filed.

tioner's efforts. (R. 385–389, 1319–1328, 1377, 1592–1594.)

Commencing in the spring of 1944 and continuing through 1951 periodic payments were made to petitioner by the treasurer of the Biow Company by means of checks drawn on the company's account. Through January 1951 all checks were made payable, at the direction of petitioner, to persons who were his friends or associates. After April 1951, when the Internal Revenue Service began an investigation of petitioner's records (R. 1029), the checks were drawn to fictitious payees. (R. 512–572, 831–832, 1391, 1405, 1407, 1408, 1421–1422, 1506, 1510, 1530, 1533, 1536, 1556.) Many of the early records of the Biow Company had been destroyed (R. 527–528, 530), but substantially all of the checks delivered to petitioner on and after December 11, 1946, were available, and the Government introduced a schedule (Ex. 62)[2] summarizing the documentary evidence as to each check (R. 530–572, 1039–1065). Biow Company checks totalling approximately $15,000 were delivered to petitioner in each of the years 1946 and 1947 (R. 534, 537), and he received six checks totalling $16,450 in 1948 (R. 537–547), seven checks totalling $20,380 in 1949 (R. 548–554), eight checks totalling $20,000 in 1950 (R. 554–

[2] This has been reproduced at the end of the appendix to the petition for certiorari.

559), and sixteen checks totalling $28,300 in 1951 (R. 560–572).[3] These payments were recorded as expenses in the Biow books, but they were not credited to petitioner's name and were distributed through various other accounts (R. 632–708). Petitioner's returns failed to include any income received from the Biow Company (R. 1037). In April 1952, during the course of the investigation in this case, petitioner told the revenue agents that he had never had any financial transactions with the Biow Company (R. 1091–1096, 1695–1700).

Taking the stand in his own defense petitioner admitted receipt of the checks and testified that, with a few exceptions, he had cashed them and received the proceeds (R. 1389–1422, 1505–1508; see Pet. 6). Two of the checks he could not recall, and a third he denied having received (R. 1412–1413, 1415–1416, 1419). Petitioner's explanation was that he simply acted as a conduit, passing on the checks or the proceeds thereof to third parties either as "gifts" or "political contributions" on behalf of the Biow Company. He testified (R. 1387; cf. 1305):

> * * * [Biow said to me], "We are very appreciative of getting this Schenley account" and indicated to me that Mr. Lyon

[3] The amounts of these checks, not always read into the record, can be determined by an examination of Exhibit 62.

> had talked to him about some political contributions and gifts and said if I would go and see [the treasurer] that he would have some checks for me; * * *

The recipients of the "gift" checks, all close associates of petitioner, knew that they were not gifts from the Biow Company (R. 872, 873, 917, 1541). None of them had performed services for the company or were even known to its officers (R. 532–572, 775, 871, 892, 894, 902, 922). Petitioner admitted that the company treasurer, from whom he received the checks, showed no interest whatsoever in the identity of the persons to whom the "gifts" were made or in the names suggested by petitioner as payees of the checks (R. 1489). And when asked why the "gifts" were made petitioner replied (R. 1408):

> Well the reason being * * *, the three or four * * * that I gave these gifts to were very close friends of mine and people who I liked and people who I wanted to do something for, * * *.

Petitioner maintained no records of either the receipt or the disbursement of the funds derived from the checks he received from the Biow Company as alleged "political contributions." (R. 1493–1495, 1539, 1589.) He did make such contributions with money received from the Brewers Institute, but, whereas his handling of these funds was always carefully supervised by repre-

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sentatives of the Institute (R. 1426–1430, 1470–1472, 1475), petitioner himself clearly admitted that the Biow Company had no interest whatsoever in the disposition of the "political contributions" checks he received from it. Petitioner testified (R. 1498, 1499–1500, 1501):

> A. The fact that I got some Biow contributions made it possible for me to be a little more liberal with maybe mayoralty candidates, council candidates, or supervisor candidates. A lot of times the Brewers were not concerned about making the contributions and I made the contributions myself. I may have made them a little more freely on account of getting some of the Biow contributions.
>
> * * * * *
>
> Q. Do you recall a single campaign in 1944 in which the Biow Company had any interest whatsoever?
>
> A. The Biow Company?
>
> Q. Yes.
>
> A. What would they have an interest in campaigns for?
>
> Q. These were political contributions that were to be made for the Biow Company, were they not?
>
> A. Not to my knowledge.
>
> Q. They were political contributions to be made by you, is that correct?
>
> A. They were political contributions * * * given to me to use at my discretion.

Q. In any way you saw fit, is that right?
A. Well, I would think so, having in mind they had a full knowledge that I was concerned about political contributions.

* * * * *

Q. Do you know of any campaign in California in 1944 in which the Biow Company had an interest?

* * * * *

The Witness: I would say no.

In rebuttal the Government produced a handwriting expert to testify as to the endorsements on the three checks which petitioner either denied or could not recall receiving. The payees of these checks were J. Under, George Green and H. Frankel. It was shown that these names had been endorsed on the checks in the handwriting of Joe Benjamin and Alex Robbins (R. 1738, 1756, 1765), both close friends of petitioner (R. 1408, 1535–1536).

ARGUMENT

1. As has been noted (*supra,* p. 6), the Biow Company entered the payments to petitioner on its books as deductible expenses, but spread them through various expense accounts and did not credit them to petitioner by name. In instructing the jury the trial court, after pointing out that the Biow Company would not be entitled to claim the payments as deductions if it intended them to be political contributions, went on to ex-

plain that if, on the other hand, the payments were made to petitioner in compensation for services rendered, they would be deductible and it would be immaterial in which particular deductible expense account they were entered on the company's books. (R. 1988, 2017.)

Petitioner asserts (Pet. 6) that the issue before the jury was "whether the payments to petitioner were compensation and, hence, taxable as income to him, or were funds made available to petitioner for the purpose of making gifts of the Biow Company or political contributions on behalf of the Biow Company."[4] He contends (Pet. 12) that the fact that the payments were distributed among other expense accounts on the company books instead of being credited to him was the most material piece of evidence in his favor, and he argues (Pet. 10–15) that the trial court's instruction as to the materiality of the method of entry nullified his defense.

There is no merit in this argument. The difficulty is that the issue which petitioner insists presented the chief question for the jury, i. e., the Biow Company's intention in making the payments, was for all practical purposes resolved adversely to him by his own testimony. For, as the opinion of the court below points out (Pet. App. vii-ix), petitioner's own testimony showed

[4] At no time did petitioner claim that the payments constituted gifts to him personally.

that the Biow Company had no interest in the recipients of either the "gifts" or the "political contributions." Petitioner clearly admitted that they were *his* gifts and *his* political contributions and that the Biow Company had nothing to do with his disposition of the money it paid to him.[5] Under these circumstances the trial judge might almost have been justified, as the opinion below notes (Pet. App. viii-ix), in instructing the jury that petitioner's admissions established that the payments constituted taxable income to him. The only real issue left for the jury to decide was whether petitioner acted wilfully in failing to report the income, or whether he had, as he testified (R. 1455–1456), relied in good faith upon the advice of his accountant. The instruction complained of had not the slightest bearing on this issue. Consequently, whatever might be said of the correctness of the instruction if the evidence as to the Biow Company's intention in making the payments were close, we submit that the court below was clearly correct in holding (Pet. App. xiv-xvi) that it could not be said to be prejudicial to petitioner under the circumstances of this case.

---

[5] There was evidence which would have justified the jury in concluding that petitioner actually retained the payments himself. He was unable to show a specific recipient of any of the "political contributions." All the "gifts" went to close friends and associates, and two of them would appear to have been used by petitioner to pay a gambling debt. (Cf. R. 840–843 with 1409–1411.)

2. Petitioner's second contention (Pet. 16–18) is disposed of by the same reasoning. Since petitioner had insisted that some of the checks were given to him to make gifts on behalf of the Biow Company, the trial court charged the jury at some length on the nature of gifts (R. 1989–1990, 2018–2019), stating during the course of these remarks that the jury could consider the fact that the payments had been charged as expenses on the books in determining whether the Biow Company intended them as gifts. Petitioner attacks the instruction on the ground that the Biow Company had admittedly charged the payments, not to petitioner's account, but to various other expense accounts.

The fact that the payments were entered on the books as expenses, even though they were spread through various acounts, clearly had some relevance to the Biow Company's intention in making them. Furthermore, as has been explained in the previous section, the issue of the Biow Company's intent was practically settled by petitioner's own admissions. He admitted that the gifts were his gifts and that the Biow Company had neither interest in, nor connection with, the recipients. Under these circumstances he could not possibly have been prejudiced by this sentence in the instruction.

There was, moreover, no objection to this portion of the charge. (R. 2001–2005, 2026.)

"* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" Rule 30, Federal Rules of Criminal Procedure.

3. There is no merit to the contention (Pet. 19–22) that petitioner was prejudiced by testimony offered to prove additional unreported income derived from gambling. The testimony was stricken and the jury was admonished to disregard it both at the time it was stricken and again in the court's final charge to the jury. (R. 1021–1023, 1975.)

Furthermore, it is by no means clear, as the opinion below points out (Pet. App. x), that the evidence was inadmissible. Petitioner was not on trial only for the unreported income from the Biow checks. The gist of the offense is that there was wilfully unreported income, not that there was a specific amount of such income. *Cave* v. *United States,* 159 F. 2d 464, 468 (C. A. 8th), certiorari denied, 331 U. S. 847. To prove more income than was stated in the indictment would neither prove another offense in the same year nor constitute substantial variance. Had petitioner been surprised and forced to continue a different question would be presented, but he requested, and was granted, a continuance when this evidence was introduced. (R. 932–968.) In addition it is well settled that proof of similar acts or offenses is admissible to establish

intent. And there was other evidence in the case which established that petitioner was a frequenter of gambling establishments and was an associate of persons engaged in gambling activities. (R. 840–847, 886, 1506, 1537.)

In view of these circumstances there is no merit to the contention that the United States Attorney should have known the evidence would be inadmissible. To the contrary, the record shows that there was reason to believe the testimony would be admissible and the record (R. 978–1022) strongly indicates that an adequate foundation had been laid for the introduction into evidence of the gambling records.[6]

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[6] In the years 1948 and 1949 the Film Row Club was a gambling establishment in San Francisco which handled bets on baseball and football games (R. 979). The club was owned and principally operated by one Harry Pelsinger who had associated with him two other persons, Harris and Burns, who were variously described as partners or employees on a profit sharing arrangement (R. 996). Petitioner placed bets with the club during the years 1948 and 1949 (R. 1006). Bettors used initials or symbols rather than their names, and in his betting activities petitioner first used the initials AS and later used the initials FX (R. 1007). Settlements of winnings and losings were made between petitioner and the Film Row Club at indefinite times (R. 1003) and Pelsinger visited petitioner's office three or four times a year for the purpose of paying money to him (R. 999), or collecting money from him (R. 1009). In 1949 Pelsinger collected gambling losses in cash from petitioner at petitioner's office on three or four occasions (R. 1009). The betting records of the club were identified and explained by Pelsinger, the principal operator, by Harris and Burns, the minor partners, and by Scatena, the accountant. These

4. Petitioner contends (Pet. 23–25) that the trial court erred in permitting the Government to introduce a chart (Ex. 62, see *supra,* p. 5) summarizing evidence relative to his receipt of the Biow Company checks. It is urged that the chart was argumentative.

The contention is without merit, for the chart was based upon documentary evidence in the form of the checks, a stipulation, and petitioner's travel record (R. 1039), and it has long been recognized that the use of such summaries is necessary where the record presents a complicated set of facts. In *United States* v. *Kelley,* 105 F. 2d 912, 918 (C. A. 2d), the court said:

> This kind of evidence when based upon documents themselves competent and accessible, is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts.

For similar decisions, see *United States* v. *Schenck,* 126 F. 2d 702, 708 (C. A. 2d); *United States* v. *Mortimer,* 118 F. 2d 266, 269 (C. A. 2d); *Bell* v. *United States,* 185 F. 2d 302 (C. A. 4th), certiorari denied, 340 U. S. 930; *Hanson* v. *United States,* 186 F. 2d

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records reflected the nature and amount of each bet made and identified the bettor by a symbol. The symbol FX appeared in the books and records. The FX bets were taken over the telephone by Harris on specific instructions from Pelsinger. Harris said he did not know who FX was (R. 1017) but Pelsinger stated that the initials FX represented petitioner (R. 1006).

61, 67 (C. A. 8th); *Cooper* v. *United States,* 9 F. 2d 216, 222–223 (C. A. 8th); *Bateman* v. *United States,* 212 F. 2d 61, 68 (C. A. 9th); *Papadakis* v. *United States,* 208 F. 2d 945, 952 (C. A. 9th); *Gendelman* v. *United States,* 191 F. 2d 993, 996–997 (C. A. 9th), certiorari denied, 342 U. S. 909; *Graves* v. *United States,* 191 F. 2d 579, 584 (C. A. 10th). In *Holland* v. *United States,* 348 U. S. 121, 127–128, this Court implicitly sanctioned the practice, though warning that it might in some circumstances be dangerous should the summaries be sent to the jury without guarding instructions. Here, no particular guarding instructions were at any time requested by the defense, and the trial court simply gave the jury the usual charge on the weight to be accorded the opinion of an expert witness in the person of agent Kisthardt through whom the Government introduced the chart.[7] (R. 1995–1996.) But, despite the lack of a more particular instruction, the chart could not possibly have been prejudicial to petitioner for, taking the stand himself subsequent to its admission, he conceded that he had received the checks and had cashed a great many of them. (See *supra,* p. 6.)

The cases cited above are, with one exception, income tax evasion cases and the use of charts and summaries was thus clearly sanctioned in this case

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[7] An examination of Kisthardt's testimony on the subject (R. 1039–1066) fails to reveal any "argument." He simply explained how he had prepared the chart and what evidence he had used.

by long usage and abundant authority. The decision in *Steele* v. *United States*, 222 F. 2d 628 (C. A. 5), upon which petitioner relies, rests principally upon the court's conclusion in that case that the particular circumstances under which a chart was sent to the jury room invested it with a special "air of credibility" in the jury's eyes (p. 630). The earlier decision of the same court in *Elder* v. *United States*, 213 F. 2d 876, certiorari denied, 348 U. S. 901, was not an income tax case, and it seems to have presented an exceptional factual situation for the opinion states (p. 881) that "no case has been cited to us having facts precisely in point with this one, nor have we found any." Furthermore, the use of the charts was found harmless in *Elder*, a situation which clearly existed here in view of petitioner's own subsequent testimony.

5. There is no merit to the contention (Pet. 25–28) that the defense was prevented from impeaching the Government's witness, Biow. On cross-examination Biow had denied stating to Lyon that he had been the cause of petitioner's tax trouble and that he would like to undo the wrong[8] (R. 408–412). Petitioner's subsequent

[8] Even if Biow had made this statement to Lyon it would not have constituted a confession that the income was taxable to him instead of to petitioner. Biow's responsibility for

attempt to have Lyon testify to such a conversation was overruled (R. 1316–1318).

In the first place the question to Lyon was improper for it stated a different date than that fixed in the cross-examination of Biow (cf. R. 405–409 with 1316–1317), and it sought to have Lyon repeat his full conversation with Biow (R. 1316–1318) instead of limiting him to the specific statements which Biow had denied making. It is improper to ask an impeaching witness to relate an entire conversation; he may be questioned only as to the specific statements sought to be impeached. *Burton* v. *United States,* 175 F. 2d 960, 965 (C. A. 5th); *New York Cent. R. Co.* v. *Dunbar,* 296 Fed. 57, 60 (C. A. 2d), certiorari denied, 265 U. S. 582. The trial court stated three times that the objection to "*this* question" (emphasis supplied) would be sustained (R. 1317–1318). The ruling was clearly proper and defense counsel did not attempt to rephrase the question.

Furthermore, as the opinion below points out (Pet. App. xii), petitioner's own testimony was so damning that he could scarcely have been prejudiced by the exclusion of Lyon's testimony even if a proper foundation had been laid for it. The Government's case did not, as petitioner repeatedly asserts (Pet. 6, 9, 25) rest wholly upon

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petitioner's tax troubles lay in the fact the Treasury agents had obtained information from him as to the payments to petitioner. (R. 397.)

the testimony of Biow and his treasurer, Zinneman. Petitioner himself admitted that he had been asked to get the Schenley contract for Biow. (R. 1377.) He admitted that he had taken some steps to do so. (R. 1378–1379.) He admitted receipt of the checks and he admitted that *he* had made the "gifts" and "political contributions." (*Supra,* pp. 7–9.) In view of this testimony it is impossible to see how a vague statement by Biow to the effect that he had done wrong to petitioner could have had any effect on the jury.

6. Equally without substance is the contention (Pet. 29–31) that the Government was allowed to introduce prejudicial testimony in rebuttal. The three checks which petitioner either denied receiving or could not recall had all been delivered to him by Zinneman, Biow's treasurer (R. 563–566), and defense counsel sought to raise a suspicion that Zinneman had appropriated the proceeds (R. 773). The rebuttal, which showed that the endorsements were in the handwriting of two close associates of petitioner (*supra,* p. 9), was clearly relevant, material and proper.

7. The final contention (Pet. 32–34) is that the prosecutor was guilty of prejudicial misconduct in calling the jury's attention to the fact that petitioner's secretary, Dorothy Raedy, who was allegedly the recipient of several of the "gift" checks (R. 1391, 1396, 1404), had not been called to testify at the trial. The remark was perfectly proper.

An unfavorable inference may be drawn where a party has it peculiarly within his power to produce a witness and fails to do so. *Graves* v. *United States,* 150 U. S. 118, 121. If the witness is equally available to both sides, no such inference may be drawn. *Himmelfarb* v. *United States,* 175 F. 2d 924, 951 (C. A. 9th), certiorari denied, 338 U. S. 860. But when there is strong likelihood of bias on the part of the witness he is not "equally available" to both sides. *United States* v. *Beekman,* 155 F. 2d 580, 584 (C. A. 2d). It is obvious, as the court below pointed out (Pet. App. xiv), that this latter case is controlling here for Miss Raedy had been petitioner's trusted employee for many years (R. 1391).

CONCLUSION

The decision of the court below is clearly correct and there are no questions of importance warranting further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1955

No. 294

ARTHUR H. SAMISH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

This is a reply and supplemental brief on behalf of petitioner under Rule 24, par. 4, Revised Rules of the Supreme Court of the United States. The requisite contents of a petition for writ of certiorari (*cf.* Rule 23) appear in the Petition and respondent's Brief in Opposition (pp. 1-3). This brief, considered as a supplemental one, (1) Explains in detail why the questions presented for review are grave ones "highly important in the administration of criminal justice and of equal importance in the administration of the revenue laws of the United States" (Petition, pp. 2-3), in conformity with Rule 19 (Point I, *post*); and (2) Undertakes to make more explicit the question of denial of fair hearing under the due process clause of the Fifth Amendment implicit in the seven questions presented for review (Petition, pp. 3-5), without

raising additional questions not passed upon by the Court below (Point II, *post*). The remainder of the memorandum replies to the respondent's Brief in Opposition (Point III, *post*).

POINT I

The decision below disposed of the perennial conflict between tax avoidance and evasion as well as the elements of willfulness contrary to rulings of this Court and of other Courts of Appeals.

Special and important reasons make grant of review of this writ an exercise of sound judicial discretion. The significant questions passed upon by the Court below were not merely ones of evidence or isolated issues of law.

Ground for lawful belief.

The classic definition of "willfully," explicitly an element of the statutory definition of the crime (1939 Int. Rev. Code §145(b), 26 U. S. C. 146(b)), as given in *United States* v. *Murdock*, 290 U. S. 389, 394-95, and referred to in the trial court's charge (R. 1987-88) includes this characterization (*id.* at 395):

> "a thing done without ground for believing it is lawful."

Viewing the evidence in the light most favorable to the Government, the Court below thus summarized the transaction (223 F. 2d 358 at 362; Brief in Opposition, pp. 10-11):

> "Samish [petitioner], without question, had done Biow [Government's witness] a huge business favor.

> Biow offers to pay Samish. Can Samish avoid tax liability by saying, 'You can't pay me. But you can make some gifts to friends of mine [not yours].' "

A widely publicized situation on all fours with this characterization of petitioner's transaction was brought to a Congressional Committee's attention. The wife of the then President of the United States had entered into a contract to do ten broadcasts of nine minutes with options for possible additional sixteen broadcasts. She was to receive a single dollar, but the contracting agent agreed that "immediately following each broadcast • • • he will mail to [a charitable organization named] a check in the sum of $3,000 for each broadcast." *Hearings before the Joint Committee on Tax Evasion and Avoidance,* 75 Cong., 1st Sess. 331-332 (1937). According to the complaining congressman, the contracting agent was to receive $4,000 for each broadcast, of which $3,000 was "to be given to charity as directed by [the President's wife] herself, and the other thousand dollars was to go to [the contracting agent] as his commission, and $400 of that to Miss [a named individual]." *Id.* 332.

An Assistant Attorney General, requested to appear before the Joint Committee in reference to the matter, found legal basis for holding no income tax due, no discrimination in the light of numerous precedents in the Bureau of Internal Revenue and no serious loss of revenue to the Government. "[S]he received no income for herself and was no richer directly or indirectly for her labors." *Id.* 425 *et seq.*

That Assistant Attorney General was an honored member of this Court at the time the evasion charged in this

case took place. In a thorough analysis of the requisites of criminal intent in a case where Congress made no such explicit requirement, the same Justice observed, without dissent: "Also, it [Congress] at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury. The law under some circumstances recognizes good faith or blameless intent as a defense, partial defense, or as an element to be considered in mitigation of punishment [citing I. R. C. §§145(a), 145(b)]." *Morissette* v. *United States,* 342 U. S. 246, 265.

When it is so widely bruited about that an individual may render valuable services for which money is transferred to an agent for contribution to a donee designated by that individual, without any income tax liability and *a fortiori* without liability for civil fraud penalties, then at the minimum grounds exist for actual bona fide belief that such is the law. Such belief, if mistaken, is a complete defense to a charge of attempting willfully to evade income taxes. The decision of the court below on this characterization of the transaction conflicts with those of courts of appeals in other circuits and disposes of a question not squarely resolved by this Court. See *Nicola* v. *United States,* 3 Cir., 72 F. 2d 780, 786; *Jones* v. *United States,* 5 Cir., 164 F. 2d 398, 400-401; *United States* v. *Raub,* 7 Cir., 177 F. 2d 312, 315-316. The point is especially pressing when in a case such as this the trial court completely ignored (R. 1974-2001) the materiality of the undisputed evidence that the taxpayer relied exclusively upon his tax consultant to fill out his returns without withholding any information about the transaction in question

(R. 1455-1457, 1613-1615). *Lurding* v. *United States,* 6 Cir., 179 F. 2d 419; *Haigler* v. *United States,* 10 Cir., 172 F. 2d 986. See also *United States* v. *Venuto,* 3 Cir., 182 F. 2d 519, 522-523. Even under an inference that payments were made to petitioner by Biow for services, their acceptance by petitioner would have amounted to commercial bribery, universally condemned as criminal [Statutes collected, 45 Harv. L. Rev. 1248 (1932). See also N. Y. Penal Law §439 subd. 1; 27 U. S. C. §205 (c) (2); *American Distilling Co.* v. *Wisconsin Liquor Co.,* 7 Cir., 104 F. 2d 582; 15 U. S. C. §13(c); *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co.,* D. C., W. D. Ky., 37 F. Supp. 728, *aff'd,* 6 Cir., 136 F. 2d 12]. Under *Commissioner* v. *Wilcox,* 327 U. S. 404, sharply controlling at the time the evasion charged took place, even this characterization of the transaction would supply ground for lawful belief.

Affirmative acts of evasion not taxpayer's.

The trial court referred to the affirmative acts of evasion in its charge (R. 1982-83) that were enumerated in *Spies* v. *United States,* 317 U. S. 492, but in doing so the Court significantly omitted to tell the jury that such acts must be those of the **defendant-taxpayer,** and not merely those of some **third person.** Use of standard instructions, generally suitable in ordinary evasion situations, was dangerously confusing under the evidence of this particular case. The affirmative acts referred to by the Court's illustration were not only those of a third person but indeed ones of the Government's key witness. The confusion was certainly not dispelled by subsequent instruction that the acts of concealment of the third person might be considered in determining petitioner's guilt (R. 1989, 2018; Petition, pp. 16-18; Brief in Opposition, pp. 12-13).

The significant element of willfulness is of course a question of fact for the jury. On review, the evidence may be viewed in a light most favorable to the Government. A verdict of guilt did not, however, preclude the reviewing Court below from insisting upon submission of the issue of willfulness to the jury, free from dangerous confusion, *Hargrove* v. *United States,* 5 Cir., 67 F. 2d 820, 825, and supported by the requisite quantum of evidence for conviction in a criminal case, *United States* v. *Cole,* D. C., S. D. Cal., C. D., 90 F. Supp. 147.

POINT II

The decision below sanctioned such departures from usual and accepted proceedings in a criminal trial as to invoke this Court's supervisory power and to present a grave question of procedural due process.

It is of no moment what effect the errors in conduct of this trial, sought to be reviewed in this Court, might have had, when considered in isolation, in an ordinary proceeding. Their cumulative effect must be appraised against a background peculiar to a prosecution for tax evasion. In this light, such errors present a mosaic of circumstances that not only invokes this Court's supervisory power of review but also implicitly presents a grave question of denial of fair hearing under the due process clause of the Fifth Amendment.

The prosecutor's opening statement, buttressed by 44 pages of testimony, characterizing petitioner as a gambler (Petition, pp. 19-22; Brief in Opposition, pp. 13-14), was of course highly prejudicial and sufficient by itself to

justify this Court's supervisory power of review. *Steele* v. *United States,* 5 Cir., 222 F. 2d 628, 631; *Ford* v. *United States,* 5 Cir., 210 F. 2d 313, 318; *Wolcher* v. *United States,* 9 Cir., 200 F. 2d 493, 497; *United States* v. *American Die & Instrument Works, Inc.,* 3 Cir., 213 F. 2d 731. The mental set created at the outset of trial could hardly be dissipated by subsequently striking such evidence from the record. *Cf. United States* v. *O'Malley,* D. C., E. D. Pa., 117 F. Supp. 895. What Mr. Justice Frankfurter observed concerning inflaming newspaper articles, outside the courtroom, is certainly no less apposite for evidence given inside it: "Science with all its advances has not given us instruments for determining when the impact of such * * * exploitation has spent itself or whether the powerful impression bound to be made * * * can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court." *Stroble* v. *California,* 343 U. S. 181, 201 (dissenting opinion).

Characterizing the defendant as a gambler may well have had irresistible glamour to jurors weighing conviction for income tax evasion. The use of tax prosecutions as a weapon against violations of other laws is a time-honored device that is widely supported and popularly deemed appropriate. See *Sen. Rep.* No. 141, 82d Cong., 1st Sess. (1951); *Sen. Rep.* No. 2370, 81st Cong., 2d Sess. 4 (1950); *American Bar Ass'n Comm. on Organized Crime, Final Rep.* 46-51 (1952); 29 *Chi-Kent L. Rev.* 197, 216-17 (1951).

This inflammatory opening, setting the atmosphere for the entire trial, was by no means singular. The confusing charge of the trial court on affirmative acts of evasion

(Point I, *ante;* Petition, pp. 10-18; Brief in Opposition, pp. 9-13); the use of a chart and Government expert as a "thirteenth juror" to give his opinions and explain the evidence to the jury (Point III, *post;* Petition, pp. 23-25; Brief in Opposition, pp. 15-17); preventing the defendant in a criminal trial from impeaching the prosecution's key witness (Point III, *post,* Petition, pp. 25-28; Brief in Opposition, pp. 17-19); permitting in a criminal case lengthy irrelevant testimony in rebuttal by the prosecution (Petition, pp. 29-31; Brief in Opposition, p. 19); and the prosecutor's prejudicial misconduct in commenting on the failure of the defendant to call a witness available to the prosecution in order to supply cumulative or corroborative testimony (Point III, *post;* Petition, pp. 32-34; Brief in Opposition, pp. 19-20)—each was a departure from usual and accepted procedure that was sanctioned by the reviewing Court below. Each is sufficient separately to warrant this Court's supervisory power of review.

Taken together, such departures may well present a cumulative effect of shortcomings which, individually considered, might not invalidate the proceedings. Sec 31 *Col. L. Rev.* 1013, 1017 (1931); Gellhorn and Byse, *Administrative Law: Cases and Comments* (1954) 897-98. Appraised against factors peculiar to the background of an income tax evasion prosecution, such mosaic of circumstances raises serious doubt of the fairness of hearing guaranteed by the due process clause of the Fifth Amendment when the stake of liberty is involved.

These peculiar background factors arise from enormous administrative changes in the exercise of the Government's discretion whether or not to prosecute in an income

tax deficiency case. Abandonment by the Bureau of Internal Revenue of the familiar "health" and "voluntary disclosure" policies, coupled with drastic reorganization of the sifting process, has enormously cut down administrative screening of civil from criminal tax deficiency cases. In the first half of 1952, 190 convictions for income tax evasion were obtained; for the same period in 1955, 389. 123 *New York World-Telegram and The Sun* No. 7, Sept. 12, 1955, p. 1, col. 2-3. The figure of 100 percent success in all criminal prosecutions for evasion is widely accepted as accurate. 53 *Col. L. Rev.* 476, 487 (1953). The almost automatic reaction of trial jurors to such indictments is not surprising in view of inflammatory, widely circulated newspaper comments insisting on even more prosecutions and Draconian punishment, with occasional threats, "It's been quite a while since the Senate convened in an impeachment proceeding of a federal judge * * *." 36 *New York Daily News* No. 306, June 17, 1955, p. 4, col. 4-5. It is not surprising to find conviction of a crane operator for deficiencies over a two-year period amounting to only $255 (*United States* v. *Roman,* D. C., E. D. N. Y., Crim. No. 43,778), and punishment meted out even upon plea of guilty.

Denial of a fair hearing in contravention of the due process clause of the Fifth Amendment was not explicitly raised in the Court below, but such denial was implicit in the seven departures from usual and accepted proceedings passed upon by that Court. See Stone, Ch. J., in *Yakus* v. *United States,* 321 U. S. 414, 444-445.

POINT III

Replying to the Government's Brief in Opposition the cases cited therein demonstrate conflict in decisions of Courts of Appeals.

On but four of the seven errors assigned in the Petition did the Government's Brief in Opposition rely upon any cases, and for one of these points upon a single dictum. In the remaining three points where cases have been cited, such reliance tends to demonstrate conflict in decisions of the Courts of Appeals:

(1) On the use of the Government's expert as a "thirteenth Juror", *cf.* Brief in Opposition, pp. 15-17 *with* Petition, pp. 23-25, and *Steele* v. *United States, supra,* 222 F. 2d 628, 629-630; *Hartzog* v. *United States,* 4 Cir., 217 F. 2d 706; *Kirsch* v. *United States,* 8 Cir., 174 F. 2d 595, 601; *Delancy* v. *United States,* 3 Cir., 77 F. 2d 916, 917.

(2) Upon restriction on defendant's efforts in a criminal trial to impeach the prosecution's key witness, *cf.* Brief in Opposition, pp. 17-19 *with* Petition, pp. 25-28, and *Olender* v. *United States,* 9 Cir., 210 F. 2d 795; *United States* v. *Augustine,* 3 Cir., 189 F. 2d 587, 590.

(3) On the question of the prosecutor's prejudicial comment on failure of a witness-employee of defendant to testify, *cf.* Brief in Opposition, pp. 19-20 *with* Petition, pp. 19-20. It should be noted that the *Himmelfarb* case (175 F. 2d 924, 951), cited by the Government's Brief (p. 20), actually supports the petitioner, since it is clear that the person who was the subject of improper comment in that case was an accountant for one of the defendants (175 F. 2d at 938-939, 946).

It may be added that contrary to the statement in the Brief in Opposition (p. 12), objection was made by petitioner to the portion of the charge relating to "gifts" (R. 2026-2027).

CONCLUSION

In exercise of sound discretion, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to grant rehearing of its order of October 10, 1955, denying his petition for writ of certiorari, on substantial grounds limited to a single point.

POINT I

The forensic misconduct of the prosecutor in making direct inflammatory appeals and introducing testimony of criminal activity not charged in the indictment, without prompt and emphatic correction by the trial judge, denied rights to notice and fair hearing implicit in Due Process, and right to Indictment by Grand Jury guaranteed by the Fifth Amendment.

Petitioner was charged with willful evasion of taxes on unreported income from a specific series of transactions

with a certain corporation in an eight count indictment (R. 3-10). He was not accused of any criminal activity arising out of gambling. In his opening, the prosecutor promptly pictured petitioner as a big-time gambler in a notorious local underworld establishment placing "during the year 1949 gross bets in excess of a million and a half dollars" (R. 318). Near the end of its case, the prosecution produced four professional gamblers, and numerous records and gambling codes. Page after page of testimony depicted the local *demi-monde* of gambling with explanations of its jargon and cybernetics. One witness identified petitioner as a mysterious large-scale gambler using a secret code (R. 997).

All such evidence was patently irrelevant to any issue of fact under the indictment. Counsel for petitioner pointedly objected from the first instant the prosecutor uttered the syllables "gambling" (R. 315) until the last exhibit was offered by the prosecution on this matter (R. 1017). The prosecutor then confessed that his gambling witnesses' "testimony will have no probative value insofar as this case is concerned" (R. 1022). Only at this juncture did the trial judge make the impossible prescription for the jury, "You are to treat such testimony as if it had never been heard * * *" (R. 1023).

The Court of Appeals below disposed of the matter with the remarkable observation, "The collapse of the government's witnesses probably inflicted damage only on the government". *Samish* v. *United States,* 9 Cir., 223 F. 2d 358, 364. See also *Pacman* v. *United States,* 9 Cir., 144 F. 2d 562, 563 ("Juries instinctively resent intemperate appeals to their supposed prejudices.").

In argument to the jury, the prosecutor sought to have the silence of petitioner's secretary taken as evidence against him. "[She] was not called as a witness in this case. [She] was a secretary of this defendant. * * * This witness was available to defendant, I submit" (R. 1846). The fact of the matter was that the witness was under subpoena by the prosecution, but not called by it. The trial judge held this not error on challenge by petitioner's counsel (R. 2125). The Court of Appeals below acknowledged that, "Actually she was held throughout the trial on a subpoena issued at the request of plaintiff", *Samish* v. *United States,* 9 Cir., 223 F. 2d 358, 365, yet found no error in this comment on failure to testify because "she undoubtedly continued to see events through his [petitioner's] eyes." *Ibid.*

The dual responsibility of a prosecutor, both to represent the government and to safeguard a defendant's rights, had at one time been recognized in the Ninth Circuit. *Taliaferro* v. *United States,* 47 F. 2d 699, 701. It is of course an obligation insisted upon by this Court. *Berger* v. *United States,* 295 U. S. 78, 88. The duty is rooted in the presumption that a prosecutor has more influence on a jury than a defense lawyer, *Di Carlo* v. *United States,* 2 Cir., 6 F. 2d 364, 368; *Fitter* v. *United States,* 2 Cir., 258 Fed. 567, 572; *People* v. *Talle,* 111 Cal. App. 2d 650, 673, 245 P. 2d 633, 649; *People* v. *Kirkes,* 243 P. 2d 816, 833 (Cal. App.). It is also based on the prosecutor's tactical advantage of having the first word in opening and the last one in closing the argument at trial. Notes, 12 *Temple L. Q.* 496, 497 (1938); 54 *Col. L. Rev.* 946, 947 (1954).

Prejudical Effect.

Appeals to patriotism in war time are *prima facie* prejudicial misconduct necessitating reversal. *August* v. *United States,* 8 Cir., 257 Fed. 388. See also *Viereck* v. *United States,* 318 U. S. 236, 247 note 3; *United States* v. *Antonelli Fireworks Co.,* 2 Cir., 155 F. 2d 631, 642 (dissenting opinion by Judge Frank); *Hall* v. *United States,* 4 Cir., 256 Fed. 748; *Elmer* v. *United States,* 8 Cir., 260 Fed. 646. The same is the case of a bank official accused of dishonesty during a depression. See *Read* v. *United States,* 8 Cir., 42 F. 2d 636. The susceptibility of this particular jury to undue influence by repeated and prolonged characterization of petitioner as engaged in vast criminal operations as a gambler is not a matter for speculation. The precedent of incapacitating a notorious racketeer and gambler by a federal income tax evasion prosecution, *United States* v. *Alphonse Capone,* 7 Cir., 56 F. 2d 927, has become a practice popularly commended as appropriate. See *Sen. Rep.* No. 141, 82d Cong., 1st Sess. (1951); *Sen. Rep.* No. 2370, 81st Cong., 2d Sess. 4 (1950); *American Bar Ass'n Comm. on Organized Crime,* Final Rep. 46-51 (1952); 29 *Chi-Kent L. Rev.* 197, 216-17 (1951).

Action by Trial Judge.

Both prosecutor and judge conceded the irrelevance of the prejudicial references to petitioner's gambling operations. No question is raised of petitioner's timely objection. Certainly a warning to disregard after all damage has been done might well serve as a reminder and only injure the petitioner more grievously. *Sf. Berger* v. *United States, supra,* 295 U. S. 78, 85 WITH *Dunlop* v. *United States,* 165 U. S. 486, 498.

Conviction Based Upon Crimes Not Charged.

To convict a defendant on the glamor of evidence of big-time underworld gambling operations upon a tame and colorless indictment for tax evasion may be a tactical triumph but it also offends procedural due process.

As this Court observed per Mr. Justice Black in *Cole* v. *Arkansas,* 333 U. S. 196, 201:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

The same Justice, speaking for the Court, in *Williams* v. *New York,* 337 U. S. 241, 246-247, has thus explained the rationale of this constitutional safeguard:

> "In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct."

Certainly the general requirements of notice and fairness implicit in procedural due process are not made less speci-

fic by the constitutional provision for indictment by grand jury demanded in a federal criminal trial by the Fifth Amendment.

CONCLUSION

The petition for rehearing should be allowed, and on rehearing the petition for writ of certiorari should be granted.

Respectfully submitted,

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I hereby certify that this petition for rehearing is made in good faith and not for purposes of delay.

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Dated: October 25, 1955.